

2704  
No. 13039

United States  
Court of Appeals  
for the Ninth Circuit.

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BANK OF AMERICA NATIONAL TRUST AND  
SAVINGS ASSOCIATION, a National Banking  
Association, and EUGENE J. O'RILEY,  
as Trustee in Bankruptcy of the Estate of  
UNITED PRODUCE COMPANY, a Corporation,  
Bankrupt,

Appellants,

vs.

MERCHANDISE NATIONAL BANK OF CHI-  
CAGO, a National Banking Association,

Appellee.

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Transcript of Record  
In Three Volumes  
Volume I  
(Pages 1 to 432)

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Appeals from the United States District Court,  
Northern District of California,  
Southern Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, for the  
Northern District of California, Southern Division

No. 28721R

MERCHANDISE NATIONAL BANK OF CHI-  
CAGO, a National Banking Association,

Plaintiff,

vs.

BANK OF AMERICA NATIONAL TRUST AND  
SAVINGS ASSOCIATION, a National Bank-  
ing Association,

Defendant.

### COMPLAINT

Plaintiff Merchandise National Bank of Chicago  
complains of defendant Bank of America National  
Trust and Savings Association and alleges a claim  
for relief as follows:

#### I.

At all times herein mentioned plaintiff Merchandise National Bank of Chicago was and is a national banking association organized and existing under the laws of the United States, located in the State of Illinois, and having its principal place of business in Chicago, Illinois.

#### II.

At all times herein mentioned defendant Bank of America National Trust and Savings Association was and is a national banking association organized and existing under the laws of the United States,

located in the State of California, with its head office and principal place of business in San Francisco, California, in the Northern District of California wherein it resides and is doing business.

### III.

Within the meaning of Section 1348 of Title 28, United States Code, at all times herein mentioned the plaintiff was and is a citizen of the State of Illinois, and defendant was and is a citizen of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000).

### IV.

At all times herein mentioned the plaintiff has had and now has a deposit account with the defendant with a credit balance in plaintiff's favor, and defendant has owed and now owes the amount of said balance to the plaintiff. On or about November 23, 1948, and at all times thereafter until February 18, 1949, the said credit balance was in the amount of \$296,451.97. On or about November 23, 1948, plaintiff made demand upon defendant to pay to plaintiff the entire amount of said credit balance, but the defendant refused and failed to pay to the plaintiff any part thereof, except that on February 18, 1949, after repeated demands, the defendant paid to the plaintiff the sum of \$183,235.47, but defendant has failed and refused and still fails and refuses to pay to the plaintiff any other sum.

## V.

In the premises the defendant is indebted to the plaintiff for interest at the legal rate, to wit, 7% per annum, on the sum of \$183,235.47 from November 23, 1948, to and including February 18, 1949, being the sum of \$3,069.50; and defendant is further indebted to the plaintiff in the sum of \$113,216.50 plus interest thereon at the legal rate from November 23, 1948, until paid.

Wherefore, plaintiff prays judgment against defendant for the sum of \$116,286.00, together with interest at the rate of 7% per annum on \$113,216.50 from November 23, 1948, until paid, and on \$3,069.50 from February 18, 1949, until paid, for its costs of suit herein incurred and for such other and further relief as may be meet and proper in the premises.

/s/ MOSES LASKY,

BROBECK, PHLEGER &  
HARRISON,

Attorneys for Plaintiff.

[Endorsed]: Filed March 22, 1949.

[Title of District Court and Cause.]

**ORDER REQUIRING PERSONS TO BE  
JOINED AS PARTY DEFENDANTS TO  
RESPOND TO COMPLAINT AND TO IN-  
TERPLEADER COUNTERCLAIM**

Bank of America National Trust and Savings Association, defendant in the above-entitled action, hereinafter referred to as "Bank of America," has moved this court ex parte for an order requiring persons not now parties to this action to be joined as party defendants to respond to the complaint of Merchandise National Bank of Chicago, plaintiff in said action, and to the interpleader counterclaim contained in the answer which said Bank of America, contemporaneously with the making of this order, is to file in this action. Said interpleader counterclaim alleges, that conflicting claims are being made by Eugene J. O'Riley, as trustee of the estate of United Produce Company, a bankrupt; Cy Mouradick, Frank C. Lofendo and plaintiff to a balance of \$30,920.36, which during the last part of 1948 stood on the books of Bank of America to the credit of Frank C. Lofendo. Said interpleader counterclaim prays that Eugene J. O'Riley, as such trustee; Cy Mouradick and Frank C. Lofendo be made parties defendant in this action to respond to the complaint of plaintiff and said counterclaim.

Good cause appearing therefor, it is hereby Ordered that Eugene J. O'Riley, as such trustee; Cy Mouradick and Frank C. Lofendo, are hereby brought into this action as parties defendant to

respond to said complaint and said interpleader counterclaim and that the clerk of this court issue a summons to Eugene J. O'Riley, as such trustee; Cy Mouradick and Frank C. Lofendo summoning and requiring them to answer said complaint and said interpleader counterclaim.

Done in Open Court this 24th day of June, 1949.

/s/ MICHAEL J. ROCHE,  
Judge.

[Endorsed]: Filed June 24, 1949.

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[Title of District Court and Cause.]

ANSWER OF FRANK C. LOFENDO, TO THE  
COUNTERCLAIM OF THE DEFENDANT,  
BANK OF AMERICA NATIONAL TRUST  
AND SAVINGS ASSOCIATION

Now comes Frank C. Lofendo, a defendant in the interpleader by counterclaim of the Bank of America National Trust and Savings Association, a national bank association, and for answer to the said counterclaim, says:

That he disclaims any interest and title to, and waives any interest and title to, the balance of \$30,920.36 on deposit with the Bank of America National Trust and Savings Association and standing to the credit of Frank C. Lofendo in his account with the said bank, at the close of business on November 19, 1948.

/s/ FRANK C. LOFENDO,  
Attorney Pro Se.

State of Illinois,  
County of Cook—ss.

I, Alvin D. Simon, a Notary Public in and for the County of Cook and State of Illinois, do hereby certify that Frank C. Lofendo, personally known to me to be the person who signed the foregoing Answer, appeared before me this First day of August, A.D. 1949, and acknowledged under oath, administered by me, that he signed the foregoing Answer as his true and voluntary act and for the purposes therein set forth.

/s/ ALVIN D. SIMON,  
Notary Public.

My Commission Expires 11/22/50.

[Endorsed]: Filed August 3, 1949.

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[Title of District Court and Cause.]

**PLAINTIFF'S REPLY TO DEFENDANT'S  
COUNTERCLAIMS**

Plaintiff Merchandise National Bank of Chicago replies to the defendant's counterclaims as follows:

Reply to First Counterclaim, Otherwise Denominated "First, Separate and Distinct Defense"

**I.**

Plaintiff admits the allegations of paragraph I.

**II.**

Answering the allegations of paragraph II, plaintiff admits, alleges, and denies as follows:

Admits and alleges that on November 13, 1948, and for several months prior thereto it had an account with defendant and continued to have that account thereafter; alleges that defendant has never paid to plaintiff the full balance in said account although demand has been made as alleged in the complaint; admits that on or about February 18, 1949, defendant sent to plaintiff, and that on February 24, 1949, plaintiff received, a check for \$183,235.47 but alleges that the balance still due after payment thereof was \$113,216.50 plus interest;

Admits that during the existence of the account, when defendant collected a check sent to it by plaintiff for collection, defendant would credit the account with the amount of the check, alleges that if defendant was unable to make collection it customarily reversed the credit, admits and alleges that when defendant sent plaintiff a check drawn on plaintiff for payment, defendant would debit the account with the amount of the check only upon receipt from the plaintiff of written authorization to do so in the form of an outstanding and unrevoked credit memorandum or advice of credit;

Denies each and every allegation of said paragraph II not hereinabove expressly admitted or alleged.

### III.

Answering the allegations of paragraph III, plaintiff admits, alleges, and denies as follows:

Admits and alleges that on November 19, 1948, and for several months prior to that date there was a deposit account with defendant at its East Bakers-

field branch maintained in the name of Frank C. Lofendo, hereinafter referred to as "Lofendo"; alleges that said account was in fact an account of United Produce Company although maintained in the name of Lofendo, and will hereafter be referred to in this answer as the "Lofendo account" for convenience only;

Admits that on November 13, 1948, six checks aggregating \$113,216.50 drawn by United Produce Company on plaintiff and payable to the name of Lofendo were delivered to defendant at its East Bakersfield branch for collection and that defendant accepted them for collection; in this connection alleges that the six checks were delivered to defendant by United Produce Company which itself endorsed the name of Lofendo thereon and that United Produce Company was both maker, in its own name, and payee, in the name of Lofendo;

Alleges that defendant did not credit the Lofendo account with the amount of the six checks or any part thereof but merely received them as agent for collection and acquired no right, title or interest in them, either at that time or at any other time;

Admits that on November 13, 1948, defendant at its East Bakersfield branch mailed the six checks to plaintiff; denies that they were sent to plaintiff for payment and alleges that they were sent to it for collection;

Admits that the plaintiff received the six checks during business hours on November 15, 1948; admits and alleges that on November 15, 1948, a clerk in plaintiff's employ did the following: (1) entered

a debit against the account of United Produce Company with the plaintiff in the amount of the six checks; (2) mailed to defendant an "advice of credit" to the effect that the six checks had been collected; (3) entered a credit on its own books to defendant in the amount of the checks; and (4) marked the six checks "paid"; alleges, in this connection, that each of these acts was done by mistake, that in fact the account of United Produce Company was without sufficient funds to pay the checks or any part of them, that in fact the checks were not collected and were not paid, and that the six checks were drawn by United Produce Company to the order of Lofendo in order to cheat and defraud the plaintiff.

Alleges further that the "advice of credit" was not received by defendant until November 19th, and that meanwhile, on November 17th, plaintiff discovered the mistake in debiting the account of United Produce Company, in crediting the defendant's account, in sending out the advice of credit, and in marking the checks paid; that thereupon, on November 17th, plaintiff did the following things: (1) it endorsed on each check the statement that it had been cancelled in error; (2) it reversed the debit entries in the account of United Produce Company; (3) it reversed the credit entries in the account of defendant; (4) it telephoned to the defendant and informed the latter that the advice of credit had been sent out by mistake, that the checks had not in fact been collected or paid, and that the advice of credit was rescinded and revoked; alleges

that defendant thereupon, on November 17th, agreed with plaintiff not to act upon the advice of credit when received.

Alleges further that at the time of this telephone conversation defendant had not yet received the advice of credit and did not yet know that the account of United Produce Company had been debited or that its account on the books of the plaintiff had been credited or that the checks had been marked paid or that an advice of credit had been sent out.

Alleges further that on the next day, November 18th, an officer of the plaintiff, fully empowered to act for it, arrived in San Francisco and in person advised the defendant that the six checks had not been collected and that the advice of credit had been sent out by mistake and was rescinded and revoked; that plaintiff rescinded the authority to defendant to charge plaintiff's account in reliance on the advice of credit when received, and defendant thereupon, on November 18th, again agreed to the said revocation and rescission and agreed that the six checks should be returned to it by plaintiff and that defendant would not act upon the advice of credit when received.

Alleges that at the time just mentioned the defendant had not yet received the advice of credit and did not yet know that United Produce Company's account with plaintiff had been debited or its own account with plaintiff credited or that the checks had been marked paid, nor had defendant yet given any credit for any part of said six checks to the Lofendo account or in any way taken any ac-

tion whatever in reliance on any advice of credit or in reliance on the supposed collection or payment of the checks, nor had it acquired any right, title or interest in said checks or their proceeds or any part thereof, and it never did so.

Alleges that pursuant to the agreement of November 18th, plaintiff on November 19th returned to the defendant the six checks and advised that they were unpaid.

Admits and alleges that late on November 19, 1948, despite the rescission and revocation of the advice of credit and contrary to its agreement, defendant debited plaintiff's account with the amount of the six checks, namely, the sum of \$113,216.50 and contemporaneously credited the Lofendo account with the same amount.

In this connection plaintiff further alleges as follows: As early as October 22, 1948, the defendant became suspicious that the Lofendo account at its East Bakersfield branch was being maintained and operated as part of a check kiting operation with United Produce Company, and on that day it gave instructions to its employees that thereafter they were not to accept for immediate credit any checks of United Produce Company drawn to the order of Lofendo and tendered to defendant for deposit in the Lofendo account but were to take any and all such checks for collection only, were to give credit only when collected, and were not to permit Lofendo to draw against any items until collection. These instructions were repeated on November 15, 1948. On that day there was a balance in the said Lofendo

account of \$13,061.17, and there was then, on that day, presented to defendant at its East Bakersfield branch for deposit to the Lofendo account five checks totalling \$97,207.00 drawn by United Produce Company to the order of Lofendo. Contrary to its own instructions defendant negligently and carelessly entered an immediate credit to the Lofendo account in the sum of \$97,207.00 and immediately on November 15th honored checks drawn on the said account and paid out funds against said credit in the amount of \$109,569.15 although the checks for \$97,207.00 had not yet been collected. But for said credit entry of \$97,207.00, the credit balance in the Lofendo account would have been insufficient by \$86,507.98 to pay the checks drawn on the account. Late on November 18, 1948, defendant was advised by its correspondent in Chicago, Illinois, that the five checks for \$97,207.00 had no funds behind them and were being returned uncollected. Defendant then found itself in the position of having sustained a loss of \$82,296.14 by reason of having negligently and carelessly given the Lofendo account credit for the five checks for \$97,207.00 and in having permitted the credit to be drawn against before collection of the checks. In order to retrieve this loss defendant desired to find some way of entering a credit in the Lofendo account in an amount sufficient to make up the over-draft so as to permit itself to charge back against the Lofendo account said \$97,207.00. Consequently, on November 19th the defendant conceived the unconscionable scheme of crediting Lofendo's account

with the sum \$113,216.50 and to this end of charging the account of the plaintiff in the same amount. Thereupon it did charge the account of the plaintiff with the sum of \$113,216.50, credit the account of Lofendo with the same amount, and simultaneously charge the Lofendo account with the sum of \$97,207.00.

Relative to the allegation in paragraph III of the First Counterclaim that "plaintiff is contending in this action that it had the right to revoke said payment by it of said six checks and that therefore it has the right to recover in this action from defendants the sum of \$113,216.50," plaintiff denies that there ever was payment of said six checks or any of them and alleges that the acts of marking the checks paid, crediting the account of defendant and debiting the account of United Produce Company on its own books, and sending out an advice of credit were merely clerical acts done by mistake, and that the first three acts were never called to the defendant's attention. Plaintiff does contend that it had a right to correct the mistake and revoke and rescind the advice of credit, and it alleges that defendant agreed to the rescission and revocation. Plaintiff further contends and alleges that if its acts were to be construed as constituting payment, then it had a right to revoke the payment, that defendant never acted in reliance on the alleged payment, that defendant never had any right, title or interest in any of said checks or any alleged proceeds thereof, that Lofendo and United Produce Company were and are guilty of attempted fraud

on the plaintiff in the premises and never had any rights against plaintiff in said checks or alleged payment thereof, and that defendant could never have greater rights therein than Lofendo or United Produce Company.

Denies each and every allegation of paragraph III not expressly admitted or alleged above.

#### IV.

Plaintiff admits the allegations of paragraph IV.

#### V.

Answering the allegations of paragraph V, plaintiff denies that in a kiting operation the bank referred to in said paragraph V as the second bank may not give the kiter's agent credit or permit drawing against the checks deposited with it until collected; admits all other allegations of paragraph V, but alleges that if the bank in which the kiter's agent deposits checks drawn to his order by the kiter does not give the agent credit before the funds represented thereby are collected, the kiter cannot carry on his kiting operations.

#### VI.

Answering the allegations of paragraph VI, plaintiff admits and alleges that the plaintiff refused payment of the five checks totalling \$97,207.00 for lack of funds in the drawer's account to pay them and further alleges that defendant did not credit the Lofendo account with \$113,216.50 until after it learned that payment had been refused on the checks for \$97,207.00.

## VII.

Answering the allegations of paragraph VII, plaintiff admits, denies, and alleges as follows:

Admits that "United Produce Company and Lofendo by carrying on said check kiting were in substance and effect falsely and fraudulently representing to defendant that all of the last-mentioned checks represented bona fide payments arising out of actual transactions, whereas said checks did not represent bona fide payments in actual transactions but were fictitious," but in this connection plaintiff alleges that United Produce Company and Lofendo by carrying on said check kiting were in substance and effect falsely and fraudulently making the same representation to the plaintiff and that they did so in order to induce plaintiff to extend credit to United Produce Company.

Denies that, in paying checks drawn by Lofendo payable to the order of United Produce Company or in crediting to the account of Lofendo checks drawn by United Produce Company payable to Lofendo, defendant relied on said or any representations or believed them to be true; alleges, in this connection, that in paying checks drawn by Lofendo payable to the order of United Produce Company and in crediting to the account of Lofendo checks drawn by United Produce payable to him defendant acted negligently and carelessly as alleged in paragraph III of this Answer.

Alleges further that defendant had no right to credit the \$113,216.50, or any part thereof, to Lofendo's account; admits that if defendant had not credited Lofendo's account with said \$113,216.50,

the Lofendo account would have shown an over-draft of \$82,296.14.

Denies each and every allegation of paragraph VII not hereinabove expressly admitted or alleged.

### VIII.

Denies each and every allegation of paragraph VIII.

Reply to Second Counterclaim, Otherwise Denominated "Second, Separate and Distinct Defense"

#### I.

Answering paragraph I whereby defendant adopts by reference certain allegations of its first counter-claim, plaintiff adopts by reference its answers to said allegations.

#### II.

Denies each and every allegation of the second counterclaim not expressly admitted above.

Reply to Interpleader Counterclaim

#### I.

Answering paragraphs I, II, IV and IX whereby defendant adopts by reference certain allegations of its first counterclaim, plaintiff adopts by reference its answer to said allegations.

#### II.

Admits the allegations of paragraph III.

#### III.

Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph V that "Eugene J. O'Riley, as such trustee, by virtue of said order and the

execution and delivery to him of the last-mentioned check claims the whole of said balance of \$30,920.36," mut admits all other allegations of paragraph V.

#### IV.

Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph VI.

#### V.

Answering the allegations of paragraph VII, plaintiff denies that Lofendo may or does claim that he is entitled to said balance of \$30,920.36, or any part of it; denies that the six checks referred to in paragraph VII were ever paid; alleges that in the event plaintiff is awarded judgment against defendant as prayed in the complaint plaintiff claims no interest in any balance in the said Lofendo account, but in the event that for any reason whatever it should be held that plaintiff is not entitled to judgment as prayed in the complaint then plaintiff does claim said balance.

Wherefore, plaintiff prays that defendant take nothing by reason of its counterclaims, and that plaintiff have judgment as prayed in the complaint.

/s/ MOSES LASKY,

BROBECK, PHLEGER &  
HARRISON,  
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed November 21, 1949.

[Title of District Court and Cause.]

ANSWER OF INTERPLEADED DEFENDANT  
TO PLAINTIFF'S COMPLAINT AND RE-  
PLY TO DEFENDANT'S INTERPLEADER  
COUNTERCLAIM

Comes now the interpleaded defendant above named, and by way of answer to plaintiff's complaint herein, and by way of reply to defendant's interpleader counterclaim herein, admits, denies and alleges as follows:

Answer to Plaintiff's Complaint

I.

Admits the allegations contained in paragraphs I, II and III thereof.

II.

Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs IV and V thereof.

Reply to Defendant's Counterclaim

I.

Replying to paragraph I thereof, alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, except that he admits the allegations therein adopted by reference to paragraph I of the

first separate and distinct defense of defendant's answer.

## II.

Admits the allegations of paragraphs II, III, IV and V thereof.

## III.

Replying to paragraphs VI, VII, VIII and IX thereof, alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, except that he admits that defendant Bank of America National Trust and Savings Association has no claim upon the said balance of \$30,920.36 and is ready and willing to deposit the same in this court, and admits that he is a citizen and resident of the State of Illinois.

Wherefore, this interpleaded defendant prays:

(1) That defendant Bank of America National Trust and Savings Association be ordered forthwith to deposit in this court the said balance of \$30,920.36.

(2) That this court render its judgment and decree that the said Eugene J. O'Riley, as trustee in bankruptcy of United Produce Company, a corporation, is the owner and entitled to the possession of the said balance of \$30,920.36, and that neither said defendant, nor the alleged claimants named in said interpleader counterclaim, to wit: plaintiff, Frank C. Lofendo, and Cy Mouradick, nor any of

them, have any right, title or interest in or to the same.

/s/ MARTIN LALOR  
CRIMMINS, JR.,  
CRIMMINS, KENT, DRAPER &  
BRADLEY,

Attorneys for Interpledaded Defendant Eugene J. O'Riley, as Trustee in Bankruptcy of United Produce Company, a Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed March 22, 1950.

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[Title of District Court and Cause.]

ANSWER OF CY MOURADICK TO PLAINTIFF'S COMPLAINT AND TO DEFENDANT'S INTERPLEADER COUNTER-CLAIM

Comes now the defendant in interpleader counter-claim, Cy Mouradick, and answering plaintiff's complaint and the defendant's interpleader counter-claim, and admits, denies and alleges as follows, to wit:

Answer to Complaint

I.

Admits the allegations of Paragraphs I, II and III of said complaint.

Answering the allegations of Paragraph IV in said complaint contained, this defendant alleges that he has no information or belief sufficient to permit him to answer the allegations of said paragraph IV and basing his denial upon such lack of information and belief, denies each, all, every and singular the allegations of said Paragraph IV.

### III.

Answering the allegations of Paragraph V in said complaint contained, this defendant alleges that he has no information or belief sufficient to permit him to answer the allegations of said Paragraph V and basing his denial upon such lack of information and belief, denies each, all, every and singular the allegations of said Paragraph IV.

### Answer to Interpleader Counterclaim

Answering the allegations of the interpleader counterclaim, Cy Mouradick admits, denies and alleges as follows:

#### I.

Admits the allegations of Paragraph I of the first, separate and distinct defense incorporated by reference in said interpleader counterclaim and answering the allegations of Paragraph II of the first, separate and distinct defense incorporated by reference in said interpleader counterclaim, alleges that he has no information or belief sufficient to permit him to answer the allegations of said paragraph II incorporated by reference and basing his

denial upon such lack of information and belief, denies, each, all, every and singular the allegations of Paragraph II of the first, separate and distinct defense incorporated by reference in said interpleader counterclaim.

## II.

Answering the allegations of Paragraph II of the interpleader counterclaim, admits the allegations of Paragraph III of the first, separate and distinct defense incorporated therein by reference.

## III.

Answering the allegations of Paragraph III of the interpleader counterclaim, alleges that he has no information or belief sufficient to permit him to answer the allegations of said Paragraph III, and basing his denial upon such lack of information and belief, denies each, all, every and singular the allegations of said Paragraph III.

## IV.

Answering the allegations of Paragraph IV of said interpleader counterclaim, and the allegations of Paragraph VI of the first, separate and distinct defense incorporated therein by reference, admits, that the balance in the account of said Lofendo on November 19, 1948, was the sum of \$30,934.76, and further answering the remaining allegations thereof, this defendant alleges that he has no information or belief sufficient to permit him to answer the remaining allegations, and basing his denial upon such lack of information and belief, denies each,

all, every and singular the allegations of said Paragraph IV not herein specifically admitted to be true.

## V.

Answering the allegations of Paragraph IV, alleges that he has no information or belief sufficient to permit him to answer the allegations of said Paragraph IV, and basing his denial upon such lack of information and belief, denies each, all, every and singular the allegations of said Paragraph IV.

## VI.

Admits the allegations of Paragraph VI.

## VII.

Answering the allegations of Paragraph VII, this defendant alleges that he has no information or beliefs sufficient to permit him to answer the allegations of said Paragraph VII, and basing his denial upon such lack of information and belief, denies each, all, every and singular the allegations of said Paragraph VII.

## VIII.

Admits the allegations of Paragraph VIII.

## IX.

Answering the allegations of Paragraph IX, this defendant admits, the allegations thereof, except the allegation that Eugene J. O'Riley and Frank C. Lofendo will voluntarily appear in this action and subject themselves to the jurisdiction of this court and in this connection, this defendant alleges he has

no information or belief sufficient to permit him to answer said allegation and basing his denial upon such lack of information and belief, denies said allegation.

Wherefore, Cy Mouradick prays that the plaintiff take nothing by its complaint on file herein; that it be ordered, adjudged and decreed by the court that this defendant, Cy Mouradick, has a valid and first lien on said bank account of the said Frank C. Lofendo with the defendant, Bank of America National Trust and Savings Association, and for such other and further relief as to the court may seem meet and proper in the premises.

MACK & BIANCO,

By /s/ [Indistinguishable.]

Attorneys for Cy Mouradick.

State of California,  
County of Kern—ss.

Cy Mouradick, being first duly sworn, deposes and says:

That he is the answering defendant named in the foregoing Answer of Cy Mouradick to Plaintiff's Complaint and to Defendant's Interpleader Counter-claim; that he has read the same and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ CY MOURADICK.

Subscribed and sworn to before me this 5th day of May, 1950.

[Seal] /s/ FAYE B. BALCH,  
Notary Public in and for the County of Kern,  
State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed May 12, 1950.

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[Title of District Court and Cause.]

### AMENDED ANSWER AND COUNTERCLAIM

Now comes Bank of America National Trust and Savings Association, the defendant in the above-entitled action, and by leave of court first had and obtained files its amended answer to the complaint of the plaintiff on file herein, and admits, denies and alleges as follows:

#### I.

Defendant admits the averments of paragraphs I, II and III of said complaint.

#### II.

Defendant denies each and every, all and singular, the averments of paragraphs IV and V of said complaint, except that defendant expressly admits the averments of the last-mentioned paragraphs to the following extent, and only to the following extent, namely: that on or about November 23rd,

1948, and at all times thereafter until on or about February 18, 1949, plaintiff had a deposit account with defendant with credit balances therein in favor of plaintiff; that as of the close of business on November 23, 1948, the balance to the credit of plaintiff in said account was the sum of \$183,530.01; that from November 23, 1948, to December 16, 1948, the balances to the credit of plaintiff in said account varied from time to time; that during the last-mentioned period the lowest balance in said account to the credit of plaintiff was the balance of \$179,167.57 to its credit at the close of business on November 29, 1948; that during the last-mentioned period the highest balance in said account to the credit of plaintiff was said balance of \$183,530.01 to its credit at the close of business on November 23, 1948; that at the close of business on December 16, 1948, the balance in said account to the credit of plaintiff was \$183,235.47; that during the period from December 16, 1948, to February 18, 1949, the balance in said account to the credit of plaintiff continued to be said \$183,235.47; that on the last-mentioned date defendant paid said \$183,235.47 to plaintiff and thus closed said account; that on or about November 23, 1948, it was agreed between plaintiff and defendant that plaintiff would cease to send to defendant checks drawn on defendant and on other banks in California for collection and for the crediting of the proceeds thereof to said account and that defendant would cease sending to plaintiff checks drawn on plaintiff, the proceeds of which would be debited to said account, and that

in this way, after the items then in transit had been received, collected and credited or debited as the case might be to said account, the balance therein to the credit of plaintiff would be fixed at a figure that thereafter would not change; that on December 4th, 1948, the firm of Brobeck, Phleger & Harrison, as the attorneys for plaintiff, delivered defendant a letter, dated December 3, 1948, a copy of which is attached hereto, marked Exhibit "A," and is hereby referred to and made a part hereof; that at the same time that Brobeck, Phleger & Harrison delivered defendant the last-mentioned letter, they delivered to it a letter, dated December 1, 1948, written by plaintiff to defendant, a copy of which is attached hereto and marked Exhibit "B," and is hereby referred to and made a part hereof; that when Brobeck, Phleger & Harrison delivered to defendant the last-mentioned letter, the balance to the credit of plaintiff in said account was not the sum demanded by plaintiff by the last-mentioned letter, that is the sum of \$290,659.04, but was the sum of \$181,528.95; that plaintiff mailed defendant another letter, dated December 8, 1948, a copy of which is attached hereto and marked Exhibit "C," and is hereby referred to and made a part hereof; that defendant received the last-mentioned letter on or about December 10, 1948; that on December 10, 1948, and for more than a month prior thereto, plaintiff had in its possession travelers checks issued by defendant in a sum exceeding \$114,400.00; that plaintiff held said travelers checks under an agreement between it and

defendant under which plaintiff had the right to sell the same and remit the proceeds of such sales to defendant after deducting therefrom a commission on such sales; that on or about December 21st, 1948, defendant informed Brobeck, Phleger & Harrison that when plaintiff had delivered to it the travelers checks of defendant then in the possession of plaintiff, defendant would pay to plaintiff the amount which according to defendant's contention was to the credit of plaintiff in said account; that on or about January 24, 1949, defendant received from plaintiff the travelers checks of defendant in the possession of plaintiff, which such travelers checks amounted to the sum of \$114,400.00; and that thereafter and on or about February 18, 1949, defendant paid to plaintiff the balance then standing to the credit of plaintiff in the said account, namely, said sum of \$183,235.47.

As a First, Separate and Distinct Defense and as a Counterclaim, defendant alleges as follows:

### I.

At all times herein mentioned plaintiff, Merchandise National Bank of Chicago, was and is a national banking association organized and existing under the laws of the United States, located in the State of Illinois, and having its principal place of business in Chicago, Illinois. At all times herein mentioned defendant, Bank of America National Trust and Savings Association, was and is a national banking association organized and existing

under the laws of the United States, having its principal place of business and head office in San Francisco, California, and doing a banking business throughout California by means of offices located in the various cities and towns in the State of California.

## II.

On November 13th, 1948, and for several months prior thereto plaintiff had an account with defendant, which will be referred to hereafter as "plaintiff's account." Plaintiff continued to have its said account with defendant until February 18th, 1949, when defendant sent plaintiff a check for the balance then in its said account, namely, \$183,235.47, and thereby closed said account. While said plaintiff's account was in existence, defendant would credit said account with amounts becoming due by it to plaintiff and would debit said account with amounts due by plaintiff to it. For example, while said plaintiff's account was in existence, when defendant collected a check sent it by plaintiff for collection, defendant would credit said account with the amount of such check and when defendant sent plaintiff a check drawn on plaintiff for payment, defendant upon such check being paid would debit said account with the amount of such payment.

## III.

On November 19th, 1948, and for several months prior to that date, Frank C. Lofendo, hereinafter referred to as "Lofendo," had a deposit account with defendant. On November 13th, 1948, Lofendo

delivered to defendant and defendant accepted from Lofendo for collection six checks, hereinafter referred to as "said six checks," aggregating \$113,216.50, drawn by United Produce Company on plaintiff and payable to Lofendo. On November 13th, 1948, defendant mailed said six checks to plaintiff for payment. Defendant is informed and believes and therefore alleges that plaintiff received said six checks during business hours on November 15th, 1948, and that plaintiff on November 15th, 1948, did the following: (i) it debited the account of United Produce Company with plaintiff with the amount of said six checks, (ii) it mailed defendant what is known in the banking business as "an advice of credit" to the effect that said six checks had been paid, (iii) it credited the defendant on its books in the amount of said checks, namely, in the amount of \$113,216.50, and (iv) it marked said six checks "paid." Plaintiff did not on November 16th, or 17th, 1948, return said six checks to defendant with a notice that they were unpaid, nor did plaintiff on either of the last-mentioned dates give defendant notice that said six checks had been dishonored. On November 19th, 1948, defendant debited said plaintiff's account with the amount of said six checks, namely, with said sum of \$113,216.50, and on the same day it credited said account of Lofendo with said amount. After November 17th, 1948, plaintiff attempted to revoke said payment of said six checks. Plaintiff is contending in this action that it had the right to revoke said payment by it of said six checks and that

therefore it has the right to recover in this action from defendant said \$113,216.50; whereas, defendant is contending in this action that plaintiff did not have the right to revoke said payment and that therefore plaintiff has no right to recover from it in this action said sum. But defendant also contends that if plaintiff has the right to revoke said payment of said six checks, it nevertheless has not the right to recover said \$113,216.50 from defendant because of the facts averred in the succeeding paragraphs of this defense and counterclaim and also in the second separate defense and counterclaim and in the third separate defense of this answer.

#### IV.

Defendant is informed and believes and therefore alleges that on November 15th, 1948, and for more than five months prior to that date, United Produce Company was a corporation with its principal place of business in Chicago, Illinois, engaged in the business of a commission merchant, that is in the business of buying wholesale vegetables, fruits and other produce and selling such produce to wholesale and retail distributors; that for a period of at least five months prior to November 19th, 1948, Lofendo was an agent of the United Produce Company employed by it to purchase from producers for its account vegetables, fruits and other produce; and that for a period, which will be referred to hereafter as "said period," commencing on July 1, 1948, and continuing to November 17, 1948, United Produce Company was engaged

in what is known in the banking business as kiting checks and was using Lofendo in order to engage in that practice.

## V.

The practice of kiting checks, in which, as just stated, United Produce and Lofendo were engaged during said period, can be described as follows: Lofendo, as the agent and tool of United Produce Company, would draw a check upon the East Bakersfield Branch of defendant, which branch will be referred to hereinafter as "said branch," and would deliver such check to United Produce Company so that United Produce Company could deposit said check to its account with plaintiff. Plaintiff upon the deposit of such check with it would credit the account of United Produce Company with plaintiff with the amount of such check. Contemporaneously, United Produce Company would draw a check payable to Lofendo on its account with plaintiff and would cause such check to be deposited to the credit of Lofendo in said account of Lofendo with said branch within such time so that when such check of Lofendo drawn to the order of United Produce Company was presented to said branch for payment, there would be funds to his credit in said branch to pay it. One side of said kiting operation was the side in which checks of Lofendo drawn to the order of United Produce Company, like the check of Lofendo just mentioned, were deposited to the credit of United Produce Company in its said account with plaintiff; and the other side of said kiting

operation was the side in which checks of United Produce Company drawn to the order of Lofendo, like the check of United Produce Company just mentioned, were deposited to the credit of Lofendo in his said account with defendant. In said kiting operation many checks during said period were used on both sides thereof, that is many checks drawn by Lofendo on his account with said branch to the order of United Produce Company were deposited in and credited to the account of United Produce Company with plaintiff and many checks drawn by United Produce Company on its account with the plaintiff to the order of Lofendo were deposited in and credited to the account of Lofendo with said branch, except that towards the end of said period defendant, with the exception of the checks for \$97,207.00 referred to in the next succeeding paragraph, did not on deposit with it of checks drawn by United Produce Company to the order of Lofendo credit Lofendo with the amount thereof, but accepted such checks for collection and did not credit the proceeds thereof to the credit of Lofendo until notified by plaintiff that such checks had been paid. The checks used on both sides of said kiting operation did not represent payments in actual transactions but were fictitious, and United Produce Company and Lofendo engaged in said kiting operation so that the former would obtain thereby credits to its account with plaintiff which it could use to make actual payments.

## VI.

At the close of business on November 8th, 1948, said account of Lofendo with defendant showed a credit balance of \$239,120.17. On November 10th, 1948, checks aggregating \$226,059.00 drawn by Lofendo against said account were presented to defendant for payment and were paid by defendant from said account, leaving a balance therein as of the close of business on November 10, 1948, of \$13,061.17. All the last-mentioned checks, except one for \$16,822.00, were payable to United Produce Company. On November 15th, 1948, Lofendo deposited in his said account with defendant checks aggregating \$97,207.00, all of which were drawn by United Produce Company on plaintiff and were payable to Lofendo, and defendant thereupon gave Lofendo credit for said \$97,207.00 and as about to be alleged permitted Lofendo to draw against said \$97,207.00 before defendant had collected the proceeds of said checks from plaintiff. When said balance of \$13,061.17 was added to said \$97,207.00, there was to the credit of Lofendo in said account on November 15th, 1948, an aggregate amount of \$110,268.17. On November 15th, 1948, checks aggregating \$109,569.15 drawn by Lofendo against said account payable to United Produce Company were presented to defendant for payment and were paid by defendant from said account, leaving a balance therein as of the close of business on November 15th, 1948, of \$699.02. On November 17th, 1948, defendant received a letter from plaintiff to the effect that four checks aggregating \$89,813.10,

theretofore deposited by Lofendo with defendant drawn by United Produce Company on plaintiff and payable to the order of Lofendo had been paid upon their presentation to plaintiff for payment and thereupon defendant on November 17th, 1948, credited said account of Lofendo with said sum of \$89,813.10. On November 17th, 1948, checks aggregating \$75,586.86 drawn by Lofendo against said account were paid by defendant from said account, leaving a balance therein as of the close of business on November 17th, 1948, of \$14,925.26. All of the last-mentioned checks were payable to United Produce Company, except one for \$23,724.50. On November 19th, 1948, said six checks aggregating \$113,216.50 were credited to said account of Lofendo with defendant, thus raising the balance in said account to \$128,141.76 (said \$113,216.50 plus said balance of \$14,925.26). Said checks aggregating \$97,207.00, for which defendant gave Lofendo credit on November 15th, 1948, were presented to plaintiff for payment on November 18th, 1948, and plaintiff thereupon refused payment thereof. Defendant was informed on November 18th, 1948, that plaintiff had refused payment of said checks aggregating \$97,207.00; and on November 19th, 1948, defendant, after being so informed, caused Lofendo's account with it to be debited with the amount of said checks aggregating \$97,207.00, thus reducing the balance in said account as of the close of business on November 19th, 1948, from said sum of \$128,141.76 to \$30,934.76. Since November 19th, 1948, no checks drawn by Lofendo against said account have been

paid. On December 23, 1948, defendant charged \$14.40 against said balance of \$30,934.76 to reimburse defendant for its cost in protesting said checks aggregating \$97,207.00, payment of which had been refused as aforesaid, thus reducing said balance to \$30,920.36. All of said checks referred to in this paragraph which were drawn by Lofendo payable to the order of United Produce Company and all of said checks referred to in this paragraph which were drawn by United Produce Company payable to Lofendo were drawn by Lofendo and United Produce Company, respectively, as part of said check kiting in which they were then engaged.

## VII.

United Produce Company and Lofendo by carrying on said check kiting were in substance and effect falsely and fraudulently representing to defendant that all of the last-mentioned checks represented bona fide payments arising out of actual transactions, whereas said checks did not represent bona fide payments in actual transactions, but were fictitious. United Produce Company and Lofendo made said representations to defendant to induce it to extend credit to Lofendo in the amount of all the last-mentioned checks payable to Lofendo and drawn by United Produce Company and to induce it to pay all of the last-mentioned checks drawn by Lofendo payable to the order of United Produce Company. Defendant in paying those of the last-mentioned checks drawn by Lofendo payable to the order of United Produce Company and

in crediting to the said account of Lofendo those of the last-mentioned checks drawn by United Produce Company payable to Lofendo relied on said representations believing them to be true. If plaintiff had the right to revoke payment of said six checks aggregating said \$113,216.50, then defendant would not have had the right to credit said \$113,216.50 to Lofendo's account with the result that said account of Lofendo with defendant, instead of showing said credit balance of \$30,920.36, would have shown an overdraft by Lofendo of \$82,296.14. In such case such an overdraft of \$82,296.14 would have been an extension of credit in that amount by defendant to Lofendo which defendant would have been induced to make to Lofendo by said fraud of Lofendo and United Produce Company in making said false representations to defendant; and so in such case defendant would have been damaged by said fraud of Lofendo and United Produce Company in the amount of such overdraft.

### VIII.

The continued existence of said kiting operation depended upon United Produce Company maintaining sufficient credits to its account with plaintiff to meet upon their presentation the checks drawn by United Produce Company to the order of Lofendo and deposited in said branch. At all times during a period of at least four months prior to November 19, 1948, plaintiff, in violation of Section 84, Title 12, U.S.C., allowed United Produce Company to incur obligations to it, not falling within

the exceptions enumerated by said section to the limitation prescribed thereby, which obligations were in excess of 10% of the amount of plaintiff's capital stock actually paid in and unimpaired plus its unimpaired surplus funds. Said obligations which plaintiff allowed United Produce Company to incur to it in violation of said section took the form of loans made by plaintiff to United Produce Company, the discounting by plaintiff of drafts drawn by United Produce Company on others and the creation in said account of United Produce Company with plaintiff of overdrafts arising out of the fact that plaintiff was permitting United Produce Company to draw on credits created by checks payable to the order of United Produce Company and deposited to its credit in its said account with plaintiff, including all said checks of Lofendo, prior to the collection of the funds represented by said checks. If plaintiff had not permitted United Produce Company to incur obligations to it in excess of those allowed by said section, United Produce Company and Lofendo could not have carried on said kiting operation during said period because on many occasions during said period if plaintiff had not permitted United Produce Company to incur obligations to it in excess of those allowed by said section there would not have been credits to the account of United Produce Company with plaintiff against which the checks drawn by United Produce Company to the order of Lofendo could have been paid, and if said credits to the account of United Produce

Company with plaintiff had not been created in said manner said kiting operation would have collapsed long prior to November, 1948, and said six checks which constituted part of said kiting operation could never have been drawn and neither plaintiff nor defendant could have suffered any loss because of said six checks. In the event plaintiff had the right to revoke said payment of said six checks said violation by plaintiff of said Section 84 for the reasons stated in this paragraph proximately caused said damage in said sum of \$82,296.14 which defendant in that event will have sustained and therefore plaintiff in that event is liable to defendant in the last-mentioned sum. And plaintiff is estopped to claim that it had the right to revoke the payment of said six checks and that it did revoke the payment thereof (i) because said loss of \$82,296.14 which defendant will suffer in the event payment of said six checks is revoked will be due to said kiting operation, and (ii) because as stated said kiting operation could not have been carried on if plaintiff had not in violation of said Section 84 permitted United Produce Company to incur obligations to it in excess of the limitation prescribed by that section.

As a Second Separate and Distinct Defense and as a Counterclaim, defendant alleges as follows:

## I.

Defendant hereby refers to paragraphs I, II, III, IV, V, VI, VII and VIII of its first separate and

distinct defense and by this reference hereby makes the last-mentioned paragraphs a part of this, its second separate and distinct defense, in the same manner and with the same effect as though said paragraphs were set forth here at length.

## II.

Defendant is informed and believes and therefore alleges that defendant acquired knowledge that Lofendo and United Produce Company were carrying on said kiting operation about October 1, 1948. Defendant alleges that if plaintiff did not acquire actual knowledge of said kiting operation about October 1, 1948, then during the period commencing about July 1st, 1948, and continuing down to November 17, 1948, plaintiff by the exercise of reasonable care in the conduct of its banking operations could have discovered that said kiting operation was going on and that continuously during said period plaintiff negligently failed to discover that said kiting operation was going on. Plaintiff did not in order to put a stop to said check kiting advise defendant by telegraph or any other means that United Produce Company and Lofendo were engaged in said check kiting and that therefore defendant should not pay checks drawn on defendant by Lofendo payable to United Produce Company and that it should not give Lofendo credit for checks drawn by United Produce Company on plaintiff payable to Lofendo, except that on November 17, 1948, plaintiff advised defendant that it had just discovered that it would suffer a heavy

loss because of a fraud that United Produce Company had perpetrated on plaintiff. Plaintiff not only did not advise defendant that United Produce Company and Lofendo were engaged in check kiting, but on the contrary on October 20, 1948, it represented to defendant that the practice of United Produce Company was to maintain with plaintiff balances averaging in satisfactory five-figure proportions; and that plaintiff found that United Produce Company was making proper use of a line of credit of \$200,000 being extended to it by plaintiff. Said representations so made by plaintiff to defendant were false. Neither on October 20, 1948, nor for several months prior to that day was United Produce Company maintaining with plaintiff balances averaging in satisfactory five-figure proportions, but on the contrary on October 20, 1948, and for several months prior to that date United Produce Company was maintaining with plaintiff credit balances which were not at all satisfactory because the only reason said account did not show almost constantly substantial overdrafts was that plaintiff was crediting to the account of United Produce Company checks, including said checks of Lofendo, and was permitting United Produce Company to draw against such credits before such checks were collected. And on October 20, 1948, and for several months prior to that date, United Produce Company was not making proper use of said line of credit which plaintiff was extending to it, but was using a substantial part of said line of credit to create credits in its

account with plaintiff so that said kiting operation could be carried on as aforesaid. Plaintiff either knew that said representations were false or plaintiff made said representations without any reasonable grounds for believing said representations to be true. Plaintiff made said representations to defendant to induce defendant to continue to pay checks drawn on defendant by Lofendo payable to the order of United Produce Company and to induce defendant to continue to give Lofendo credit for checks drawn by United Produce Company on plaintiff payable to Lofendo and defendant in continuing to pay such checks of Lofendo and in continuing to give Lofendo credit for such checks of United Produce Company relied on said representations. If plaintiff on about October 1, 1948, when it, according to the information and belief of defendant acquired knowledge that said check kiting was going on, had put a stop to said check kiting, said six checks which constituted a part of said check kiting could never have been drawn and neither plaintiff nor defendant could have suffered any loss because of said six checks. As heretofore alleged, plaintiff during the period from July 1, 1948, to November 17, 1948, negligently failed to discover said check kiting and negligently permitted said check kiting to continue. If plaintiff about October 1, 1948, did not have knowledge of said check kiting, then plaintiff by the exercise of reasonable care could have discovered said check kiting about that date and prior thereto; and if plaintiff by the exercise of such care had so dis-

covered said check kiting and had thereupon stopped it, said six checks which constituted part of said check kiting would never have been drawn and neither plaintiff nor defendant could have suffered any loss because of said six checks. If as defendant is informed and believes, plaintiff about October 1, 1948, had knowledge of said check kiting and did not put a stop to it, plaintiff from that time to November 17, 1948, when said check kiting came to an end was in effect participating in said fraud perpetrated on defendant by United Produce Company and Lofendo. Plaintiff by negligently failing to discover and to put a stop to said kiting operation became liable to defendant for any damages which defendant may suffer by reason of said fraud perpetrated on defendant by United Produce Company and Lofendo. By reason of the facts alleged in this separate and distinct defense and counterclaim, plaintiff, if it had a right to revoke the payment of said six checks, is liable to defendant in said sum of \$82,296.14; and by reason of the facts alleged in this separate and distinct defense and counterclaim, plaintiff is estopped to assert that it had the right to revoke or did revoke the payment of said six checks.

As a Third Separate and Distinct Defense defendant alleges as follows:

### I.

Defendant hereby refers to paragraphs I, II, III, IV, V, VI and VII of its first separate and distinct

defense and to paragraph II of its second separate and distinct defense and by this reference hereby makes the last-mentioned paragraphs a part of this, its third separate and distinct defense, in the same manner and with the same effect as though said paragraphs were set forth here at length.

## II.

Defendant is informed and believes and therefore alleges that when plaintiff on November 18th, 1948, refused to pay said checks aggregating \$97,207.00, it knew that defendant on November 15th, 1948, had credited said account of Lofendo with said sum of \$97,207.00; and that when plaintiff refused to pay said checks aggregating \$97,207.00, it also knew that said \$97,207.00 would be applied to the payment of checks drawn by Lofendo against said account payable to the order of United Produce Company for which plaintiff prior to such payment had given United Produce Company credit. On November 15th, 1948, defendant applied said \$97,207.00, plus said balance of \$13,061.17 to the credit of Lofendo in said account when said \$97,207.00 was credited thereto, to said checks aggregating \$109,569.15 and which had been drawn by Lofendo on his said account and were payable to United Produce Company. Defendant is informed and believes and therefore alleges that plaintiff upon deposit of said checks aggregating \$109,569.15 with it had given United Produce Company credit for the amount thereof before the collection of the funds represented thereby; that, therefore, when

defendant paid the last-mentioned checks it was in effect paying an obligation in the sum of \$109,569.15 due plaintiff by United Produce Company which United Produce Company would not otherwise have been able to pay; and that plaintiff attempted to revoke its said payment of said six checks drawn by United Produce Company on plaintiff payable to Lofendo because by revoking said payment plaintiff would increase the balance to the credit of United Produce Company in its said account with plaintiff which said balance plaintiff was in a position to apply and on or about November 18th, 1948, did apply on account of United Produce Company's indebtedness to it. Plaintiff is estopped to revoke the payment of said six checks because plaintiff, with knowledge of said kiting and of defendant's reliance on said representations that said checks being paid by it and said credits being given by it arose out of bona fide transactions, should not in equity and good conscience be permitted to take advantage of said credit of \$97,207.00 and thus reduce United Produce Company's obligation to it in this amount while at the same time revoking payment of said six checks which revocation if allowed would have these results: (i) it would increase the credit balance of United Produce Company applicable by plaintiff to the payment of the latter's obligations to it; and (ii) it would compel defendant against its wishes to become Lofendo's creditor in the amount of said overdraft of \$82,296.14 and thus compel defendant to absorb part of the loss which plaintiff should bear.

Wherefore, defendant prays (i) that this court hold that plaintiff did not have the right to revoke its payment of said six checks and that plaintiff recover nothing from defendant; and (ii) that if this court holds that plaintiff had the right to revoke said payment of said six checks, it nevertheless is not entitled to recover anything from defendant; and (iii) for such other, further and different relief as this court may deem equitable and meet.

.....,  
S. B. Stewart, Jr.,

.....,  
G. D. Schilling,

.....,  
Morse Erskine.

ERSKINE, ERSKINE &  
TULLEY,

By .....,  
Morse Erskine,  
Attorneys for Defendant.

#### Interpleader Counterclaim

Defendant, as an interpleader counterclaim against plaintiff, Lofendo; Eugene J. O'Riley, trustee in bankruptcy of United Produce Company, and Cy Mouradick, alleges as follows:

##### I.

Defendant hereby refers to paragraphs I and II of its first separate and distinct defense of its fore-

going answer and hereby makes the last-mentioned paragraphs a part of this, its interpleader counter-claim, in the same manner and with the same effect as though the last-mentioned paragraphs were set forth here at length.

## II.

Defendant hereby refers to paragraph III of its first separate and distinct defense of its said answer, except the last two sentences of said paragraph III, and by this reference hereby makes said paragraph III, except its last two sentences, a part of this its interpleader counterclaim, in the same manner and with the same effect as though said paragraph III, except its last two sentences, were set forth here at length.

## III.

Defendant is informed and believes and therefore alleges that on November 15th, 1948, and for several months prior to that date, United Produce Company was a corporation with its principal place of business in Chicago, Illinois, engaged in the business of a commission merchant, that is in the business of buying wholesale vegetables, fruits and other produce and selling such produce to wholesale and retail distributors; and that for a period of at least two months prior to November 19th, 1948, Lofendo was an agent of the United Produce Company employed by it to purchase from producers for its account vegetables, fruits and other produce.

## IV.

Defendant hereby refers to all of paragraph VI

of its first separate and distinct defense of said answer, except the last sentence of said paragraph VI, and by this reference hereby makes said paragraph VI, except its last sentence, a part of this, its interpleader counterclaim, in the same manner and with the same effect as though said paragraph VI, except its last sentence, were set forth here at length.

## V.

On or about December 1st, 1948, United Produce Company was adjudicated bankrupt by the United States District Court for the Northern District of Illinois, Eastern Division. On or about said date on which United Produce Company was adjudicated bankrupt, Eugene J. O'Riley was appointed receiver of the estate of United Produce Company. On or about said date on which Eugene J. O'Riley was appointed such receiver, he qualified as such receiver and entered upon his duties as such. Thereafter Eugene J. O'Riley was appointed trustee of said estate and qualified as such trustee. Eugene J. O'Riley continued to act as receiver of said estate from his appointment as such until his appointment as trustee, and he is now and ever since his appointment as trustee has been acting in that capacity. On or about January 13th, 1949, the last-mentioned court made an order, a copy of which is attached hereto, marked "Exhibit D," and is hereby referred to and made a part hereof. Defendant is informed and believes and therefore alleges that pursuant to the last-mentioned order Lofendo executed and delivered to Eugene J. O'Riley as such

receiver his check drawn on defendant in the amount of said balance of \$30,934.76, which stood to the credit of Lofendo in his account at the close of business on November 19th, 1948. Said balance of \$30,934.76 was reduced on December 23, 1948, to \$30,920.36 by said charge against it in said sum of \$14.40. Eugene J. O'Riley, as such trustee, by virtue of said order and the execution and delivery to him of the last-mentioned check claims the whole of said balance of \$30,920.36.

## VI.

On or about March 31st, 1949, Cy Mouradick, as plaintiff, commenced an action against Lofendo, as defendant, in the Superior Court of the State of California in and for the County of Kern in which action Cy Mouradick seeks to recover from Lofendo the sum of \$12,336.21. At the time Cy Mouradick commenced the last-mentioned action, he caused said account of Lofendo with defendant to be attached by leaving with the East Bakersfield Branch of defendant at which said account of Lofendo was carried a copy of the writ of attachment issued in said action, together with a notice to the effect that all credits due by defendant to Lofendo were attached in pursuance of such writ. Said action has not been tried and is still pending in the last-mentioned court and said attachment is now and ever since its said levy on defendant has been in full force and effect. Mouradick by virtue of said attachment claims an interest in said balance of

\$30,920.36 equal to the amount Mouradick may recover against Lofendo in said action.

### VII.

Plaintiff by virtue of the fact that said balance of \$30,920.36 was created by crediting said account of Lofendo with the aggregate amount of said six checks, the payment of which it attempted to revoke, may claim that it is entitled to the last-mentioned balance; and Lofendo, despite the fact that he executed and delivered to Eugene J. O'Riley, as such trustee, said check, may nevertheless claim that he is still entitled to the last-mentioned balance.

### VIII.

Defendant is unable to decide and determine the respective rights of Eugene J. O'Riley, as trustee, and Cy Mouradick to said balance of \$30,920.36, and defendant is also unable to decide any claims plaintiff and Lofendo may make to the last-mentioned balance. Defendant has no claim upon the last-mentioned balance and is ready and willing to and hereby offers to deposit the same in this court, or deliver the same to such person as this court may direct.

### IX.

Defendant is informed and believes and therefore alleges that Eugene J. O'Riley and Frank C. Lofendo are citizens and residents of the State of Illinois and Cy Mouradick is a citizen and resident of the State of California; defendant is informed and believes and therefore alleges that if this court

orders Eugene J. O'Riley, as such trustee; Cy Mouradick and Frank C. Lofendo to be made parties defendant to respond to this interpleader counterclaim, Eugene J. O'Riley and Frank C. Lofendo will voluntarily appear in this action and subject themselves to the jurisdiction of this court, but that if they do not do so this court, as it will have jurisdiction of the res (said balance of \$30,920.36) can get jurisdiction of Eugene J. O'Riley, as such trustee, and Frank C. Lofendo by constructive service of process, and that therefore Eugene J. O'Riley and Frank C. Lofendo can be made parties to this action without depriving this court of jurisdiction of this action.

## X.

Defendant has incurred costs and expenses and will continue to incur costs and expenses in maintaining this interpleader counterclaim, and it has incurred and will continue to incur to its attorneys who are representing it in this action an obligation to pay such attorneys a reasonable fee for their services in connection with the maintaining of said interpleader counterclaim.

Wherefore, defendant prays that the court order Eugene J. O'Riley, as such trustee; Cy Mouradick and Frank C. Lofendo to be made parties defendant to respond to the complaint of plaintiff and this interpleader counterclaim; that Eugene J. O'Riley, as such trustee; Cy Mouradick, Lofendo and plaintiff be required to interplead together and among themselves concerning their said claims to said bal-

ance of \$30,920.36; that defendant upon either paying said balance into this court or delivering the same to such person as this court shall direct, shall be discharged from any liability to any of said persons on account of said balance; that defendant recover judgment for said costs, expenses and attorneys fees incurred by it in connection with the maintaining of this interpleader counterclaim; and that defendant have such other and further and different relief as to this court may seem equitable and meet.

Dated June 15, 1950.

/s/ S. B. STEWART, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE.

ERSKINE, PILLSBURY &  
TULLEY,

By /s/ MORSE ERSKINE,

Attorneys for Defendant.

Exhibit "A"

Brobeck, Phleger & Harrison

Attorneys at Law

One Eleven Sutter Street, San Francisco 4

Cable Address

Brobeck

Telephone

Sutter 1-0666

December 3, 1948.

Bank of America National Trust  
and Savings Association,  
300 Montgomery Street,  
San Francisco, California.

Re: Merchandise National Bank of Chicago.

Gentlemen:

We deliver to you herewith demand of Merchandise National Bank of Chicago to transfer the entire balance of its account with you to Federal Reserve Bank of Chicago for its credit and advice. Although oral demand was made upon you at our conference of November 23rd, supplementing certain demands by wire, the present written demand was deferred so that sufficient time would elapse to permit current items to clear and the account to reach a static figure.

Under date of November 19, 1948, Merchandise National Bank returned to your East Bakersfield branch as unpaid and uncollected items six checks drawn on it by United Produce Company, each payable to Frank C. Lofendo, dated November 8, 1948,

numbered 31054-31059, inclusive, in the following amounts: \$18,426, \$15,665, \$17,976, \$22,692.50, \$20,031 and \$18,426. By letter of November 22, 1948, your East Bakersfield branch returned these unpaid and uncollected checks to Mr. F. C. Messenger, Comptroller of the Merchandise National Bank.

Our client, Merchandise National Bank of Chicago, declines to accept the return of these checks. The position of our client on the matter being entirely clear, it seems pointless to be mailing these checks back and forth. They have been forwarded to us and are now in our possession subject to your disposition. We herewith tender them to you.

Very truly yours,

BROBECK, PHLEGER &  
HARRISON,

By /s/ MOSES LASKY.

ML:MS

enc.

Exhibit "B"

Merchandise National Bank of Chicago  
Merchandise Mart, Chicago 54

Allen R. LeRoy,

Vice President.

December 1, 1948.

Bank of America National Trust & Savings Assoc.  
300 Montgomery Street,  
San Francisco, California.

Gentlemen:

The undersigned has as of this date on deposit with you to this account the sum of Two Hundred

Ninety Thousand Six Hundred Fifty-Nine Dollars and Four Cents (\$290,659.04).

Demand is hereby made upon you to transfer forthwith the entire balance of Two Hundred Ninety Thousand Six Hundred Fifty-Nine Dollars and Four Cents (\$290,659.04) to the Federal Reserve Bank of Chicago for the credit and advice of the undersigned.

Very truly yours,

MERCHANDISE NATIONAL  
BANK OF CHICAGO,

/s/ ALLEN R. LeROY,  
Vice President.

ARL

C

Exhibit "C"

Merchandise National Bank of Chicago  
Merchandise Mart, Chicago 54

Allen R. LeRoy,  
Vice President.

December 8, 1948.

Bank of America National Trust & Savings  
Association,  
300 Montgomery Street,  
San Francisco, California.

Gentlemen:

On December 4, 1948, a written demand in the form of a letter was served on you by our attorney, Mr. Lasky of Brobeck, Phleger & Harrison, for the

balance in our account with you. You have failed and refused to comply with that demand, apparently on the contention that the balance owed to us is less than we claim to be the fact.

We are prepared to receive from you a remittance in such amount as you are willing to admit is due and owing. This is without prejudice to our claim that a greater amount is owing and without prejudice to our right to recover interest at the legal rate on all sums from the first demands made on you until date of remittance.

Remittance may be made by transfer to the Federal Reserve Bank of Chicago for our credit and advice.

Very truly yours,

MERCHANDISE NATIONAL  
BANK OF CHICAGO,

By /s/ ALLEN R. LeROY,  
Vice President.

ARL

C

## Exhibit "D"

In the United States District Court for the Northern  
District of Illinois, Eastern Division

In Bankruptcy—No. 48 B 539

In the Matter of

UNITED PRODUCE COMPANY, an Illinois  
Corporation,

Debtor.

**ORDER**

This matter coming on to be heard on the 14th day of January, 1949, on motion of Raymond W. Ickes, attorney for Eugene J. O'Riley, receiver duly appointed by order of this Court on 6 December, 1948, the parties being present in open court both personally and by their attorneys, the Court having heard the arguments of counsel and being fully advised in the premises and having jurisdiction of the parties, Finds:

1. That there stands in the name of Frank C. Lofendo at Bank of America National Trust and Savings Association, East Bakersfield, California Branch, a checking account in which there are on deposit funds in the amount of Thirty Thousand Nine Hundred Thirty-Four Dollars and Seventy-Six Cents (\$30,934.76), representing the balance in said account after all debits and credits;
2. That said funds were deposited in said account by and on behalf of United Produce Company, Inc., debtor herein;

3. That Frank C. Lofendo claims no property interest in said funds and has indicated in open court his willingness to aid the receiver in the recovery of said funds on behalf of the estate of the debtor;

and it is therefore hereby

Ordered that Frank C. Lofendo make, execute and deliver to Eugene J. O'Riley, receiver herein, his check drawn on said Bank of America National Trust and Savings Association, East Bakersfield, California Branch, in the amount of Thirty Thousand Nine Hundred Thirty-Four Dollars and Seventy-Six Cents (\$30,934.76), payable to the order of Eugene J. O'Riley, receiver of the estate of the debtor.

Further Ordered that such action on the part of Frank C. Lofendo shall not be taken as an admission or evidence that said Frank C. Lofendo is indebted to said United Produce Company.

Entered this 13th day of January, 1949.

CAMPBELL,

United States District Judge.

In the United States District Court for the Northern District of Illinois, Eastern Division

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an Order made and entered in said Court on the 13th day of January, 1949,

as fully as the same appears of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 25th day of January, 1949.

[Seal] ROY H. JOHNSON,  
Clerk.

By E. S. DAVIS,  
Deputy Clerk.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 24, 1950.

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[Title of District Court and Cause.]

### AMENDED COMPLAINT

Leave of court to amend the complaint having been granted on motion made in open court on the trial of this cause, plaintiff Merchandise National Bank of Chicago files this, its amended complaint, against defendant Bank of America National Trust and Savings Association and alleges a claim for relief as follows:

#### I.

At all times herein mentioned plaintiff Merchandise National Bank of Chicago was and is a national banking association organized and existing under the laws of the United States, located in the State of Illinois, and having its principal place of business in Chicago, Illinois.

## II.

At all times herein mentioned defendant Bank of America National Trust and Savings Association was and is a national banking association organized and existing under the laws of the United States, located in the State of California, with its head office and principal place of business in San Francisco, California, in the Northern District of California, wherein it resides and is doing business.

## III.

Within the meaning of Section 1348 of Title 28, United States Code, at all times herein mentioned Illinois, and defendant was and is a citizen of the Illinois, and defendants was and is a citizen of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000).

## IV.

At all times herein mentioned the plaintiff has had and now has a deposit account with the defendant with a credit balance in plaintiff's favor, and defendant has owed and now owes the amount of said balance to the plaintiff. On or about November 23, 1948, and at all times thereafter until February 18, 1949, the said credit balance was in the amount of \$386,283.07. On or about November 23, 1948, plaintiff made demand upon defendant to pay to plaintiff the entire amount of the credit balance in said account, but the defendant refused and failed to pay to the plaintiff any part thereof,

except that on February 18, 1949, after repeated demands, the defendant paid to the plaintiff the sum of \$183,235.47, but defendant has failed and refused and still fails and refuses to pay to the plaintiff any other sum.

## V.

In the premises the defendant is indebted to the plaintiff for interest at the legal rate, to wit, 7% per annum, on the sum of \$183,235.47 from November 23, 1948, to and including February 18, 1949, being the sum of \$3,069.50; and defendant is further indebted to the plaintiff in the sum of \$203,047.60 plus interest thereon at the legal rate from November 23, 1948, until paid.

Wherefore, plaintiff prays judgment against defendant for the sum of \$206,117.10, together with interest at the rate of 7% per annum on \$203,047.60 from November 23, 1948, until paid, and on \$3,069.50 from February 18, 1949, until paid, for its costs of suit herein incurred and for such other and further relief as may be meet and proper in the premises.

/s/ MOSES LASKY,

BROBECK, PHLEGER &  
HARRISON,

Attorneys for Plaintiff.

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 29, 1950.

[Title of District Court and Cause.]

### AFFIDAVIT

State of California,  
City and County of San Francisco—ss.

Morse Erskine, being duly sworn, deposes and says:

I am one of the attorneys for the defendant in the above-entitled action. I am that one of the attorneys for the defendant who has been handling the litigation from the time it was commenced.

Depositions were taken in Chicago in this action commencing on or about December 5, 1949, and continuing until on or about December 16, 1949. I represented the defendant upon the taking of these Chicago depositions.

One of the Chicago depositions was that of Allen R. LeRoy.

I quote from pages 103-104 of Mr. LeRoy's deposition as follows:

“Q. All right. Now, would you please explain to me, Mr. LeRoy, why there was an error in the sending out of the advices of credit with respect to the six checks aggregating \$113,000, when, so far as I know, no claim has been made by the Merchandise Bank that there was an error in sending out the advices of credit, Defendant's Exhibits for identification, B, C, D and E on the taking of the Messenger Deposition.

“Mr. Lasky: Just a moment. May I hear that question again, please, Mr. Reporter.

(The question was thereupon read by the Reporter as above recorded.)

“Mr. Lasky: That is an improper question, but I will not press it.

“Mr. Erskine: I think it is proper cross-examination.

“The Witness: Shall I answer?

“Mr. Lasky: Go ahead.

“A. As a matter of fact, the same error was committed in paying those, or in reporting them paid, as in the reporting of the \$113,000 paid; but this advice had been received by the Bank of America, and they had acted on it, whereas the other advice had not been received by the Bank of America.

“Perhaps we might take your advice, and file a claim for that.

“Mr. Erskine: I move that the last sentence of the statement go out.

“Mr. Lasky: Not only do I contend that it should stay in, but I am very seriously thinking about following the suggestion.

“The Witness: I think it is a hell of a good idea!

By Mr. Erskine:

“Q. Then as I understand you, Mr. LeRoy, the same error was made with respect to the \$89,000 as was made with respect to the \$113,000; is that right? A. Yes, sir.”

The advices of credit referred to in the first ques-

tion put to Mr. LeRoy in the extract which has just been quoted as defendant's Exhibits for identification B, C, D, E, upon the taking of Messenger's deposition (the correct designations given these Exhibits for identification upon the taking of the Messenger deposition were 15 B, C, D and E) were the advices of credit relating to checks aggregating \$89,813.10 which advices of credit were introduced in evidence upon the trial of this action.

Plaintiff by the amendment which it is seeking to make to its complaint seeks to recover from defendant the sum represented by said checks for \$89,813.10.

As indicated by the extract from the LeRoy deposition quoted above, counsel for plaintiff when in Chicago in December, 1949, was seriously considering making claim on behalf of plaintiff against defendant for said \$89,813.10.

On or about April 27, 1950, a pre-trial conference in this action took place before the Hon. Louis E. Goodman, one of the judges of the above-entitled Court. Rule 16 FRPC provides that in such a conference "The necessity of desirability of amendments to the pleadings" may be considered. Pursuant to said Rule 16, I, as attorney for defendant, upon said pre-trial conference, informed the Court that defendant had taken depositions in Chicago which showed the advisability of amending its answer in certain respects; that defendant therefore intended to amend its answer; and that defendant would prepare and serve upon the attorneys for plaintiff a copy of the proposed amendment as soon

as the same could be prepared. Judge Goodman thereupon instructed me to prepare and serve such a proposed amendment as soon as practical. I said that I would do so, but that I would not move to amend defendant's answer in the respects in which I believed it should be amended until the case was called for trial. At that time the case was set for trial for May 23, 1950; but it was not anticipated that it would go to trial on that date but that it would be reached at a later date. I caused a copy of the proposed amendment to be delivered to attorneys for plaintiff on or about May 5, 1950.

At this pre-trial conference, counsel for defendant did not say anything with respect to any intention on his part to amend his complaint in any way whatever.

When plaintiff did not seek to file an amendment to its complaint, defendant assumed that plaintiff had abandoned its claim that plaintiff had a right to recover from defendant said additional sum of \$89-813.10; and defendant in trying this action did not introduce evidence for the purpose of meeting any such claim on the part of plaintiff. The only evidence which defendant introduced relating to the point was introduced incidentally because defendant believed that such evidence had a bearing upon plaintiff's claim to recover its payment of the checks referred to in the trial as "the six checks."

Defendant did not believe that plaintiff would attempt to make such additional claim in this action until counsel for plaintiff stated in Court on Monday afternoon, June 26, 1950, after both sides had

rested, that he would like permission of the Court to file an amended complaint for the purpose of making such additional claim. Such statement by plaintiff's counsel took defendant entirely by surprise and defendant had not theretofore made any effort to prepare to answer such application.

Wherefore, defendant prays for an order of this Court setting aside its order allowing plaintiff to file an amended complaint and for such other relief as may be deemed meet.

/s/ MORSE ERSKINE.

Subscribed and sworn to before me this 29th day of June, 1950.

[Seal] /s/ LAURA J. ROOP,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires Sept. 28, 1952.

[Endorsed]: Filed June 29, 1950.

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[Title of District Court and Cause.]

#### STIPULATION CONCERNING TESTIMONY OF DEAN HOWELL

It Is Hereby Stipulated, by and between the undersigned parties, that the attached memorandum entitled "Testimony of Dean Howell," may be deemed to be the testimony of Dean Howell, duly given in this cause under oath on behalf of whatever party shall offer it in evidence at the trial.

Each party, however, reserves the right at the time the testimony is offered to make any objection it may see fit to any part thereof, save and except

(a) There will be no objection on the ground that the witness is not personally testifying in court or that the testimony has not been taken in the form of a deposition;

(b) There shall be no objection to the recitals of the contents of any writing on the ground of the best evidence rule or on the basis that the writing itself should be produced; and

(c) There shall be no objection made to the attached memorandum as a whole, but objections, if any, should be made to specific parts thereof just as if each statement were in response to a separate question.

Dated May 29, 1950.

/s/ MOSES LASKY,  
BROBECK, PHLEGER &  
HARRISON,  
Attorneys for Plaintiff.

/s/ S. B. STEWART, JR.,  
/s/ G. D. SCHILLING,  
/s/ MORSE ERSKINE,  
ERSKINE, PILLSBURY &  
TULLEY,

By /s/ MORSE ERSKINE,  
Attorneys for Defendant.

[Endorsed]: Filed June 21, 1950.

[Title of District Court and Cause.]

**AFFIDAVIT OF JOHN R. McDONOUGH**

State of California,  
City and County of San Francisco—ss.

John R. McDonough, being first duly sworn, deposes and says:

I am one of the attorneys for the plaintiff in this case.

On Monday, June 26, 1950, during the trial of this cause, I was sitting at plaintiff's counsel table in the court room, on the side next to the counsel table occupied by Mr. Erskine, counsel for defendant. When Mr. Lasky arose to address the court and after he stated "If the court please, now that the evidence is closed, I wish to make a motion for leave to amend the complaint to conform to evidence," and before he had said anything further, I heard Mr. Erskine say to Mr. Tobey, "Here comes the eighty-nine thousand."

/s/ JOHN R. McDONOUGH.

Subscribed and sworn to before me this 19th day of July, 1950.

[Seal] /s/ EUGENE P. JONES,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 19, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF MOSES LASKY IN OPPOSITION TO MOTION OF DEFENDANT FOR AN ORDER SETTING ASIDE ORDER ALLOWING PLAINTIFF TO FILE AMENDED COMPLAINT

State of California,

City and County of San Francisco—ss.

Moses Lasky, being duly sworn, deposes and says: I am one of the attorneys for the plaintiff in the above-entitled action. I tried the case on behalf of plaintiff, and I am personally familiar with all the facts herein stated.

In December, 1949, defendant took the deposition of Frederick C. Messenger in Chicago, Illinois. On December 5, 1949, Mr. Erskine, defendant's attorney, interrogated the witness concerning the collection of checks for \$89,813.10 and inquired why, if there was an error in sending out the advice of credit for the items totaling \$113,216.50, the same error had not been made with respect to the \$89,813.10. This subject is covered at pages 225-231 of the Messenger deposition.

On the next day, December 6, 1949, the following colloquy occurred, as reported at pages 356-360 of that deposition:

“Mr. Lasky: While he is looking at that, and this can be on the record: May I ask you a question?

“When I took depositions of various employees and officers of the Bank of America I was given

documents only when I asked for some specific document.

"Do I have your assurance that I have every scrap of paper in the files of the Bank of America relating to Lofendo, United Produce Company and Merchandise National Bank, so far as Lofendo and United Produce Company are concerned?

"Mr. Erskine: I think you have, although I can't be positive. I will check and make sure. I produced everything you asked for.

"Mr. Lasky: But I made no blanket demands, I made specific demands.

"Mr. Erskine: We produced everything you asked for.

"Mr. Lasky: That does not answer my question.

"Mr. Erskine: I did answer it. I think you have everything.

"Mr. Lasky: If, subject to what Mr. Riordan says, if I have your assurance that you have given to me every memo of any kind, scrap of paper in the files of Bank of America relating to Lofendo, the Lofendo Account, Merchandise National Bank, so far as it relates to Lofendo and the Lofendo account, and the United Produce Company, then, even though I don't think you are entitled to it, we will do the same here in respect to you.

"Mr. Erskine: How about it, Mr. Tobey? I asked you to dig them up.

"Mr. Tobey: You asked me for a group of records and I handed the whole bunch at once, and you went through and marked them and took them, A, B, C, D and E—

“Mr. Lasky: You retained one document under what I thought was a wholly unrelated [unjustified?] claim of privilege.

“Mr. Erskine: That is true. We retained Tobey’s report to Schilling.

“Mr. Lasky: I don’t believe under the evidence produced then it was a privileged document because it was not prepared as a report to Schilling.

“Mr. Erskine: It was. It was addressed to him, as I remember, wasn’t it? Isn’t that correct Mr. Tobey?

“Mr. Tobey: That is correct.

“Mr. Lasky: All right. With that exception, you have given me everything?

“Mr. Erskine: Is that right, Mr. Tobey?

“Mr. Tobey: Yes.

“Mr. Lasky: All right, we will proceed the same with you, then.

“There is one item you did not show me, though, I am sure, and that is the evidence showing when, the hour of the day, when, on November 17th the Advice of Credit was received from Merchandise National Bank covering the \$89,000-odd dollars that you were talking about yesterday, and when on that day a check of Lofendo payable to Feldbaum for approximately \$23,000 was paid.

“Mr. Erskine: Have we any record of the time of day on which those papers were received? Is there any?

“Mr. Tobey: I don’t know that.

“Mr. Erskine: Do you stamp the advice of credit?

"Yet, we offered in evidence an Advice of Credit showing the receipt of that \$89,000.

"Mr. Tobey: Yes. If there is any documents like that we haven't done there is no way, we cannot add to the thing, other than to make a statement now if there is anything there that is missing I would say, subject to Mr. Erskine's approval, I don't know of anything that we would not submit to you.

"Mr. Lasky: Then when we return to San Francisco you gentlemen will undertake to look into the records of your bank to ascertain whether there is anything which shows the hour of the day when the Advice of Credit was received at the East Bakersfield Branch of the \$89,000-odd item, and to show the time of the day, to show when the check to Feldbaum was paid.

"You recall on that day, November 17th, three checks were honored at the East Bakersfield branch and one of them was to Feldbaum, and the check to Feldbaum is among the exhibits which Mr. Tobey produced on his deposition, and if the records would show the time of receipt and payment of those items you will produce them?

"Mr. Tobey: Yes.

"Mr. Erskine: Make a note of that.

"Mr. Lasky: Then we will produce these documents, because my attitude is the same as that Mr. Erskine has expressed, that we have nothing to conceal, even though we think these things are irrelevant, and we will battle that out at the trial."

By the foregoing colloquy Mr. Erskine and Mr. Tobey represented to me that they had already fur-

nished to me all the available information on the subjects referred to, unless they should inform me otherwise and should furnish additional data after their return to San Francisco. Thereafter, neither Mr. Erskine nor Mr. Tobey furnished any further information to me until the trial and then only as related below.

On the first day of the trial, June 15, 1950, the court adjourned early in the afternoon with the request to counsel to meet and attempt to stipulate to facts. Thereupon I went to Mr. Erskine's office and stated to him and to Mr. Tobey the matters upon which I desired a stipulation. While engaged in this discussion, I referred to the promise made in Chicago by Mr. Erskine and Mr. Tobey to furnish further information, if there was any, concerning the item of \$89,813.10 and the three checks for \$75,586.86, of which the Feldbaum check referred to in the colloquy quoted above was one. I inquired whether Mr. Erskine or Mr. Tobey had any further information to give him on the subject. Thereupon Mr. Tobey, in an embarrassed fashion, stated that the checks for \$75,586.86 had been lying around defendant's East Bakersfield branch for several days. I then asked why he had not told me the fact at the time I took his deposition. He replied that I had directed no questions to that subject.

On the next trial day, June 16th, all counsel met in the court's chambers, with the court, to discuss stipulations and further procedure. I then stated that I demanded production by defendant of a cer-

tain report made by Mr. Tobey, which defendant had refused to produce during the depositions on the grounds of privilege. Mr. Erskine then stated that he would consider whether he would produce the report, and I replied that if he refused to do so, I would call Mr. Tobey to the witness stand, before plaintiff's case was closed, to lay the foundation for requesting an order of the court to compel production.

On the next day of the trial, June 19th, Mr. Erskine, cross-examining Mr. Messenger, again made inquiry into the matter of the \$89,813.10, similar to the inquiry made in the course of the deposition in Chicago. He thus brought the subject into the case. He concluded his inquiry on this subject with the statement (R. Tr. 220) "I think we will be able to stipulate to some additional facts."

Mr. Erskine failed to give any response to my request for the production of Mr. Tobey's alleged privileged document until the sixth day of the trial, June 22nd. Mr. Erskine then addressed the court concerning the alleged privileged document. He denied that it contained anything new. He said (Tr. 528),

"But there is nothing in the report that is not in evidence."

And again (Tr. 532):

"Now, we are going to give them the report, your Honor, because there is nothing in that report that is not completely before this Court. \* \* \* it does not hurt us, I will be frank to say

that. Otherwise I would put up a fight on the proposition."

Court and counsel then met in chambers for further discussion of stipulations. Then and there, in chambers, Mr. Erskine for the first time produced and handed to me the so-called confidential Tobey report. The trial then recessed for the lunch period. During the lunch period I was able, for the first time, to examine that report.

On return to court after lunch I immediately called attention to three new matters of which I first learned from the report and stated that I desired a stipulation about them (Tr. 535). The following colloquy occurred:

"Before you do that, may I suggest that, having examined the report of Mr. Tobey, there are two or three matters in there that I would like to get into evidence, and perhaps we can get it in by agreement.

"Mr. Erskine: What are they? Of course, your Honor, he is entitled to see the report, perhaps, as part of the discovery but the report is clearly hearsay.

"Mr. Lasky: That is right; that is right, but it makes certain statements of fact.

"The Court: Which reflects a situation which you may agree upon.

"Mr. Lasky: That was it. Obviously, if we couldn't agree upon it, I would have to call Mr. Tobey and ask questions on it."

Mr. Erskine refused to stipulate to two of the three matters. The third had to do with the checks

for \$75,586.86 and their relationship to the \$89,-813.10. The following colloquy then occurred:

“Mr. Erskine: I agree to that but I would like to put it in my own words, and consider the words in which it is put. We can put it in that stipulation that we were discussing the other day.

“Mr. Lasky: You wish to draw up some language. I think we can wait.

“Mr. Erskine: Mr. Tobey doesn’t agree with that. However, I am perfectly willing to put into the stipulation that we were discussing the other day when this same subject what is in the report. That is the fact.

“The Court: With reference to that last matter?

“Mr. Erskine: Yes. I don’t know as counsel’s language is quite correct.

“Mr. Lasky: I was summarizing it pretty hastily, obviously.

“The Court: Very well then, you can work on that as part of the stipulation.

“Mr. Erskine: Part of the other stipulation.

“The Court: Very well.

“Mr. Erskine: I think I should be permitted to go ahead with my case.

“Mr. Lasky: This is one of the points kept open on my case.”

Thereafter I was waiting upon Mr. Erskine to prepare the proposed stipulation in his own language. Mr. Erskine failed to prepare it. After waiting patiently for some time, I prepared a draft, since the trial was drawing to a close. This draft was reviewed in the court’s chambers among counsel

and the court on Saturday, June 24th. Mr. Erskine and Mr. Tobey refused to agree to it as prepared, and suggested changes. I accepted all changes which they requested, and the stipulation was thereupon at that late date finally agreed to and made a part of Plaintiff's Exhibit 14. The trial then adjourned over Sunday, June 25th.

On Sunday, June 25th, I was for the first time able to review the facts relating to the \$89,813.10 as they had finally come to my attention and as they had finally been established by the undisputed, and in large part stipulated, evidence. I then concluded that these facts, of which I had not theretofore been apprised, entitled the plaintiff to recover the sum of \$89,813.10, in addition to the sum of \$113,216.50.

Consequently, on the very next day, Monday, June 26th, I moved the court for leave to amend the complaint. I respectfully represent to the Court that in all respects I have acted diligently and as speedily as the facts became available, and that the failure to obtain the facts and bring them into the case at an earlier time was due entirely to the unwillingness of defendant's counsel to produce them or to agree upon them.

The motion to amend, as made on Monday, June 26, 1950, was "to conform to the evidence" (R. Tr. 773). It was based on evidence fully before the Court, and defendant's counsel has in no way been taken by surprise or prejudiced. In further support of this statement that counsel has not been surprised, plaintiff submits herewith an affidavit of

John R. McDonough covering matters of which I have no personal knowledge.

/s/ MOSES LASKY.

Subscribed and sworn to before me this 19th day of July, 1950.

[Seal] /s/ EUGENE P. JONES,  
Notary Public in and for the City and County of San Francisco, State of California.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 19, 1950.

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[Title of District Court and Cause.]

**AFFIDAVIT OF MR. MORSE ERSKINE IN  
SUPPORT OF MOTION TO STRIKE COM-  
PLAINT**

State of California,  
City and County of San Francisco—ss.

Morse Erskine, being duly sworn, deposes and says:

I am making this affidavit in opposition to the affidavit filed by Mr. Lasky.

On page 4 of his affidavit Mr. Lasky refers to the following colloquy which took place during the taking of the Chicago deposition:

“Mr. Lasky: Then when we return to San Francisco you gentlemen will undertake to look into the records of your bank to ascertain whether there is

anything which shows the hour of the day when the Advice of Credit was received at the East Bakersfield Branch of the \$89,000-odd item, and to show the time of the day, to show when the check to Feldbaum was paid.

"You recall on that day, November 17th, three checks were honored at the East Bakersfield Branch and one of them was to Feldbaum, and the check to Feldbaum is among the exhibits which Mr. Tobey produced on his deposition, and if the records would show the time of receipt and payment of those items you will produce them?

"Mr. Tobey: Yes.

"Mr. Erskine: Make a note of that."

It should be noted that in this colloquy Mr. Lasky asked Mr. Tobey and me to undertake to look into the records of the bank to ascertain the two facts mentioned in the colloquy. Mr. Lasky wanted this information to determine whether his client had, in his opinion, a claim against defendant for \$89,813.10. It would have been a very easy matter for him to have asked me for this information. A simple telephone call would have sufficed. But neither at the pre-trial conference nor at any time prior to the trial did Mr. Lasky ask me for it.

Prior to the taking of the Chicago depositions in December of last year, Mr. Lasky took in San Francisco the depositions of certain of defendant's officers, including Mr. Etribou and Mr. Tobey. Upon the taking of the San Francisco depositions, records of defendant were marked for identification, and photostatic copies of such records were made

a part of the depositions, and photostatic copies thereof were delivered to Mr. Lasky.

In the Chicago colloquy Mr. Lasky asked Mr. Tobey and me to look into the records of the Bank to ascertain two facts, (1) whether there is anything which shows the hour of the day when the advices of credit for the four checks for \$89,813.10 were received and (2) when the check to Feldbaum was received and paid.

Upon the taking of Mr. Etribou's deposition the advices of credit for the four checks aggregating \$89,813.10 were marked as part of Plaintiff's Exhibit 27 for identification. And these advices of credit were introduced in evidence upon the trial and marked Defendant's Exhibit J. Each of these advices of credit has the stamp of the branch on its back showing that it was received at the Branch on November 16th at approximately 11:30 a.m. And so after the San Francisco depositions were taken Mr. Lasky either knew the hour of the day when these advices of credit were received at the Bakersfield Branch or had this information readily available to him.

The second item mentioned by Mr. Lasky in the Chicago colloquy was when the check to Feldbaum was received and paid. Upon the taking of Mr. Tobey's deposition, all of the cancelled checks drawn by Lofendo on his account at the branch during November, 1948, were marked as Plaintiff's Exhibit 7 for identification. These checks included "the Feldbaum check," that is a check for \$23,724.50, drawn by Lofendo to the order of Max Feldbaum

& Sons Inc., and also two other checks drawn by Lofendo to the order of United, one for \$28,319.87 and the other for \$23,542.49. These three checks aggregate \$75,586.86. The Feldbaum check and the other two checks were perforated "Paid November 17th, 1948." And so after the San Francisco depositions were taken Mr. Lasky either knew or had the information readily available to him that the Feldbaum check and the other two checks were paid on November 17th.

Upon the taking of Mr. Etribou's deposition, the ledger card of the Lofendo account was marked Plaintiff's Exhibit 2 for identification. This ledger sheet shows that as of November 17th there was credited to the account the \$89,813.10 and that as of that day there were charged against the account the Feldbaum check and said other two checks. And so after the taking of the San Francisco depositions Mr. Lasky not only had in his hands a photostatic copy of the Feldbaum check and the other two checks all of which were perforated "Paid November 17th," but he also had in his hands a photostatic copy of the ledger sheet of the Lofendo account showing that these checks were charged against the account as of November 17th, 1948.

Mr. Lasky could have gotten from the records placed in his hands when the San Francisco depositions were taken all the information for which he asked in the Chicago colloquy, except that he could not have learned therefrom when the three checks for \$78,586.86 had been received at the branch.

On pages 6-7 of his affidavit Mr. Lasky states

that after the Tobey report was given to him he called attention to three new matters of which he first learned from the report; that he asked me for a stipulation respecting them; that I refused to stipulate to two of these matters; and that the "third had to do with the checks for \$75,586.86 and their relationship to the \$89,813.10."

An examination of the record (T.535, 18-25; 536, 1-11) shows that the two matters with respect to which I refused to stipulate related to the crediting of the six checks to Lofendo's account and the debiting of Lofendo's account for the \$97,270.00. These two matters were fully covered by evidence introduced upon the trial and have nothing whatever to do with the alleged excuse presented by Mr. Lasky in his affidavit for having delayed attempting to make on plaintiff's behalf the additional claim for \$89,813.10 until after both plaintiff and defendant had rested and the evidence was closed.

Mr. Lasky, after stating in his affidavit that one of the "new matters" which he learned from the Tobey report, had to do with the checks for \$75,586.86 and their relationship to the \$89,813.10, says in his affidavit:

"On Sunday, June 25th, I was for the first time able to review the facts relating to the \$89,813.10 as they had finally come to my attention and as they had finally been established by the undisputed, and in large part stipulated, evidence. I then concluded that these facts, of which I had not theretofore been apprised, entitled the plaintiff to re-

cover the sum of \$89,813.10, in addition to the sum of \$113,216.50.

"Consequently on the very next day, Monday, June 26th, I moved the court for leave to amend the complaint. I respectfully represent to the Court that in all respects I have acted diligently and as speedily as the facts became available, and that the failure to obtain the facts and bring them into the case at an earlier time was due entirely to the unwillingness of defendant's counsel to produce them or to agree upon them."

As a matter of fact, Mr. Lasky did not move to amend his complaint until the late afternoon of the 26th (T. 773, 16-20) after the evidence was closed. But, as I have already said, Mr. Lasky after the San Francisco depositions were taken had in his hands photostatic copies of instruments which showed that the advices of credit for the four checks were received at the branch on the morning of November 16th; that the amount of these four checks were credited to the Lofendo account as of November 17th; and that the three checks for \$75,586.86 were marked paid as of November 17th and were charged against the account as of that day. And so long prior to the trial Mr. Lasky had in his hands all of the instruments showing the facts with respect to the checks for \$75,586.86, and their relationship to the \$89,813.10, except the facts with respect to when the three checks for \$75,586.86 had been received at the branch, and I believe he knew all of these facts, with said exceptions, prior to the commencement of the trial.

On pages 4-5 of Mr. Lasky's affidavit he said that on the first day of the trial, June 15th, 1950, a conference took place between him and Mr. Tobey and myself in which he "referred to the promise made in Chicago by Mr. Erskine and Mr. Tobey to furnish further information, if there were any, concerning the item of \$89,813.10 and the three checks for \$75,586.86"; and then Mr. Lasky on page 5 of his affidavit says:

"Thereupon (at the conference of June 15th) Mr. Tobey, in an embarrassed fashion, stated that the checks for \$75,586.86 had been lying around defendant's East Bakersfield Branch for several days. I then asked why he had not told me the fact at the time I took his deposition. He replied that I had directed no questions to that subject."

The conference referred to by Mr. Lasky in that part of his affidavit just quoted took place in my office. Mr. Lasky, Mr. Riordan, Mr. Tobey and I were present.

My best recollection is that in this conference Mr. Lasky made no reference whatever to the Chicago colloquy to which I have referred. This conference of June 15th was held in my office pursuant to the suggestion made by the court that Mr. Lasky and I should confer in order to arrive at stipulations of fact (T. 116-118). As Mr. Lasky states in his affidavit, in this conference Mr. Tobey told Mr. Lasky that the checks for \$75,586.86 had been retained by the branch for a few days before they were charged against the account. I deny that Mr. Tobey gave Mr. Lasky this information "in an

embarrassed fashion." On the contrary, Mr. Tobey gave this information to Mr. Lasky in an entirely frank manner. I have no recollection that when Mr. Tobey gave this information to Mr. Lasky, Mr. Lasky then asked Mr. Tobey why Mr. Tobey had not said this when his deposition was taken; and my best recollection is that Mr. Lasky did not put any such question to Mr. Tobey.

That part of Mr. Lasky's affidavit last quoted shows he was informed on the first day of the trial that the branch had received the three checks for \$75,586.86 a few days before they were charged to the account; and so the facts show that Mr. Lasky had all the information with respect to the three checks for \$75,586.86 and their relationship to the checks for \$89,813.10 at the very latest on the first day of the trial.

I call attention to the fact that I delivered the Tobey report to Mr. Lasky on Thursday morning, June 22nd (T. 532 and 535). The last day of the trial on which evidence was taken was Monday, June 26th. Mr. Lasky states in his affidavit that it was not until Sunday, June 25th, that he "was for the first time able to review the facts relating to the \$89,813.10." It is clear from what is stated in this affidavit that Mr. Lasky knew all the facts relating to the \$89,813.10 and the \$75,586.86 prior to receiving the Tobey report; but I respectfully submit to the court that if Mr. Lasky did not know these facts until he received the Tobey report, he had plenty of time prior to Sunday, June 25th, within which to review them.

As indicated by my first affidavit filed in support of the motion Mr. Lasky, during the taking of the Chicago depositions, said that he was "very seriously" thinking about making a claim for the \$89,813.10. I respectfully submit that the thought that he might be able to make such a claim did not come to him as a new idea on Sunday, June 25th.

I also respectfully submit that the facts show that Mr. Lasky did not act "diligently and as speedily as the facts became available." I also respectfully submit that his statement that his "failure to obtain the facts and bring them into the case at an earlier time" than Monday, June 26th, "was due entirely to the unwillingness of the defendant's counsel to produce them or to agree upon them," is not at all justified and is entirely incorrect.

As stated in my first affidavit, I informed Judge Goodman at the pre-trial conference which took place on or about April 27th, 1950, that I desired to amend defendant's answer. Judge Goodman at that time instructed me to serve such amendment on Mr. Lasky as soon as practicable. I immediately prepared my amendment and served it on Mr. Lasky on or about May 5th.

In fairness Mr. Lasky at the pre-trial conference should have informed Judge Goodman that he intended to amend his complaint to include the claim for \$89,813.10 or that he was seriously considering doing this. If Mr. Lasky had made such a statement, I am sure that Judge Goodman would have told him that he should make up his mind about the proposition and if he concluded to make

such a claim, he should promptly serve defendant with an amended pleading so that defendant would have adequate notice of the additional claim and could prepare to meet it in the trial.

Under the circumstances this was the only fair thing to do. A claim for \$89,813.10 is not a small claim; and when a plaintiff intends to make such a claim against a defendant he in fairness should at the earliest practical time serve on defendant a pleading giving defendant notice of the claim so that defendant can prepare to meet it; and he should not wait until the evidence on the trial is closed to ask leave to file such a pleading.

It is true, as stated in Mr. McDonough's affidavit, that when on the afternoon of June 26th after the evidence was closed Mr. Lasky stepped to the lectern and said that he wished to make a motion to amend his complaint, the thought went through my mind that the only amendment he could possibly be proposing was the amendment which he had suggested in Chicago, that is an amendment including an additional claim for the \$89,813.10; and it is true that I, when this thought occurred to me, mentioned it to Mr. Tobey. But it is nevertheless the fact that Mr. Lasky could have asked for such leave at the pre-trial conference, or at some other time prior to the trial, so that defendant could have prepared to meet the claim, and that his failure to do so was unfair and inexcusable.

/s/ MORSE ERSKINE.

Subscribed and sworn to before me this 7th day of September, 1950.

[Seal] /s/ LAURA J. ROOP,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission expires Sept. 28, 1952.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 7, 1950.

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[Title of District Court and Cause.]

#### STIPULATION OF FACTS

1. In view of the fact that defendant, Bank of America National Trust and Savings Association, has stated in its brief that if its motion to strike the amended complaint of plaintiff is denied it desires to make certain offers of proof, It Is Hereby Stipulated between the parties as follows:

If said motion is denied the following facts shall be deemed to have been proved, subject, however, to a motion by plaintiff that said facts should be stricken on the grounds of immateriality and irrelevancy, namely:

(a) The photostats attached hereto marked Defendant's Exhibit ZZ are true copies of the four checks referred to in Defendant's Exhibit J and may be used in lieu of the originals. The perforations thereon, "PD. 11-12-48" is plaintiff's stamp; the endorsement appearing thereon, "Pay to the

order of any bank, banker or trust company E. Bakersfield Branch, Bank of America N. T. & S. A., Bakersfield, Cal. Successor to Bank of Italy, N. T. & S. A., Bank of America of California," is defendant's endorsement.

(b) On November 17, 1948, plaintiff had on hand checks of United Produce Company drawn on plaintiff and plaintiff did not thereafter return any of said checks then in its hands, including the four checks of which defendant's Exhibit ZZ is a copy, to United Produce Company, but plaintiff retained all such checks, including said four checks, in its possession, except the six checks for \$113,-216.50 which were disposed of as otherwise shown by the evidence.

(c) Plaintiff has not returned the four checks of which defendant's Exhibit ZZ is a copy to defendant nor did plaintiff at any time offer to do so, except that in plaintiff's closing brief filed in this action it made such an offer.

2. It is also stipulated that the photostat attached hereto and marked Plaintiff's Exhibit 35 is a true copy of the front and back of the signature card of Frank C. Lofendo account at defendant's East Bakersfield Branch signed and left with defendant at the opening of that account by Frank C. Lofendo on March 12th, 1948; and that said Exhibit 35 may be used in lieu of the original and that it may be deemed that said exhibit was offered by the plaintiff and received in evidence prior to the close of the trial herein, subject, however, to a

Subscribed and sworn to before me this 7th day of September, 1950.

[Seal] /s/ LAURA J. ROOP,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission expires Sept. 28, 1952.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 7, 1950.

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(b) On November 17, 1948, plaintiff had on hand checks of United Produce Company drawn on plaintiff and plaintiff did not thereafter return any of said checks then in its hands, including the four checks of which defendant's Exhibit ZZ is a copy, to United Produce Company, but plaintiff retained all such checks, including said four checks, in its possession, except the six checks for \$113,216.50 which were disposed of as otherwise shown by the evidence.

(c) Plaintiff has not returned the four checks of which defendant's Exhibit ZZ is a copy to defendant nor did plaintiff at any time offer to do so, except that in plaintiff's closing brief filed in this action it made such an offer.

2. It is also stipulated that the photostat attached hereto and marked Plaintiff's Exhibit 35 is a true copy of the front and back of the signature card of Frank C. Lofendo account at defendant's East Bakersfield Branch signed and left with defendant at the opening of that account by Frank C. Lofendo on March 12th, 1948; and that said Exhibit 35 may be used in lieu of the original and that it may be deemed that said exhibit was offered by the plaintiff and received in evidence prior to the close of the trial herein, subject, however, to a

motion by defendant that said exhibit should be stricken on the ground of immateriality and irrelevancy.

3. There was introduced in evidence during the trial and marked Defendant's Exhibit A, the advice of credit dated November 15, 1948, relating to said six checks. Said exhibit has been misplaced and cannot be located by the Clerk of the Court. It is therefore stipulated that the photostats of the front and back of said advice of credit attached hereto and marked Exhibit A are true copies of the front and back of said advice of credit and that said photostat copies is hereby substituted for and may be used in lieu of said original Exhibit A.

Dated November 9, 1950.

/s/ MOSES LASKY,

BROBECK, PHLEGER &  
HARRISON,

/s/ THOMAS P. RIORDAN,

RIORDAN, LINKLATER &  
BUTLER,

Attorneys for Plaintiff.

/s/ MORSE ERSKINE,

ERSKINE, PILLSBURY &  
TULLEY,

Attorneys for Defendant.

Lofendo, Frank C.

Com'l

The undersigned depositor agrees with **Bank of America** that the account is to be carried by said bank as a **COMMERCIAL SAVINGS** account and all funds which the undersigned depositor has or may have on deposit therein with said bank shall be governed by its By-Laws, all future amendments thereto, all regulations passed or hereafter to be passed by its Board of Directors pursuant to said By-Laws, and by all rules and practices of said bank relating thereto including interest, service charges, etc.

Sign Mr. Frank C. Lofendo  
 Name Frank C. Lofendo  
 Street Bakersfield Inn  
 Address Bakersfield  
 City Bakersfield Telephone 5-5951  
 Business or Business Occupation Birthplace Chicago  
 Father's Name Peter Mother's Maiden Name Anna Lofendo  
 Introduced by John J. Tosca Bank Reference

Open Account Date 4/19/48  
 Acct. 1/1/48 Aver. 500 C  
 Closed 30 min. 36 Bal. 30 min. 36 Reason 2nd 1/400  
 TEL-10012 ASSISTANT CARD, INDIVIDUAL, OR INDIVIDUAL TRUSTEE

Authorization for delivery or mailing of statements and cancelled vouchers and of reported items, and for monthly service charges, etc., and agreement requiring examination of cancelled vouchers and statements.

Frank C. Lofendo 5-5951  
 Bakersfield Inn LA 5-5555  
 ADDRESS PHONE 5-1244

To **BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION**

You are hereby requested to make disposition of statements and cancelled vouchers of the amount of the undersigned as indicated by check mark.

The undersigned will call for his statements and cancelled vouchers within fifteen days after they are ready for delivery. If not called for within such time, you may at your option, but you shall not be required to, either deliver them by messenger, or deposit them with the U. S. Mail, not registered, postage prepaid, addressed to the undersigned at the above address.

The undersigned requests you to deliver by messenger, or deposit with the U. S. Mail, not registered, postage prepaid, all statements and cancelled vouchers of the amount of the undersigned at the above address.

It is agreed that all responsibility for loss in transit of statements and cancelled vouchers delivered by messenger or deposited with the U. S. Mail is assumed by the undersigned. The undersigned hereby agrees to examine carefully all cancelled vouchers and statements and to notify the bank of any error and to make any claim for credit or refund within ten days from the date of discovery. The undersigned agrees to pay to the bank the amount of all statements and cancelled vouchers in any other event not later than ten days after actual receipt of cancelled vouchers and statements, no matter how obtained. Claim for credit or refund shall not be made after the expiration of such respective periods.

You are authorized without any responsibility on your part for loss in transit, to return any and all checks which the undersigned has deposited, or which are otherwise presented to the bank for payment, to the undersigned, at the above address by messenger, or by deposit with the U. S. Mail, not registered, postage prepaid.

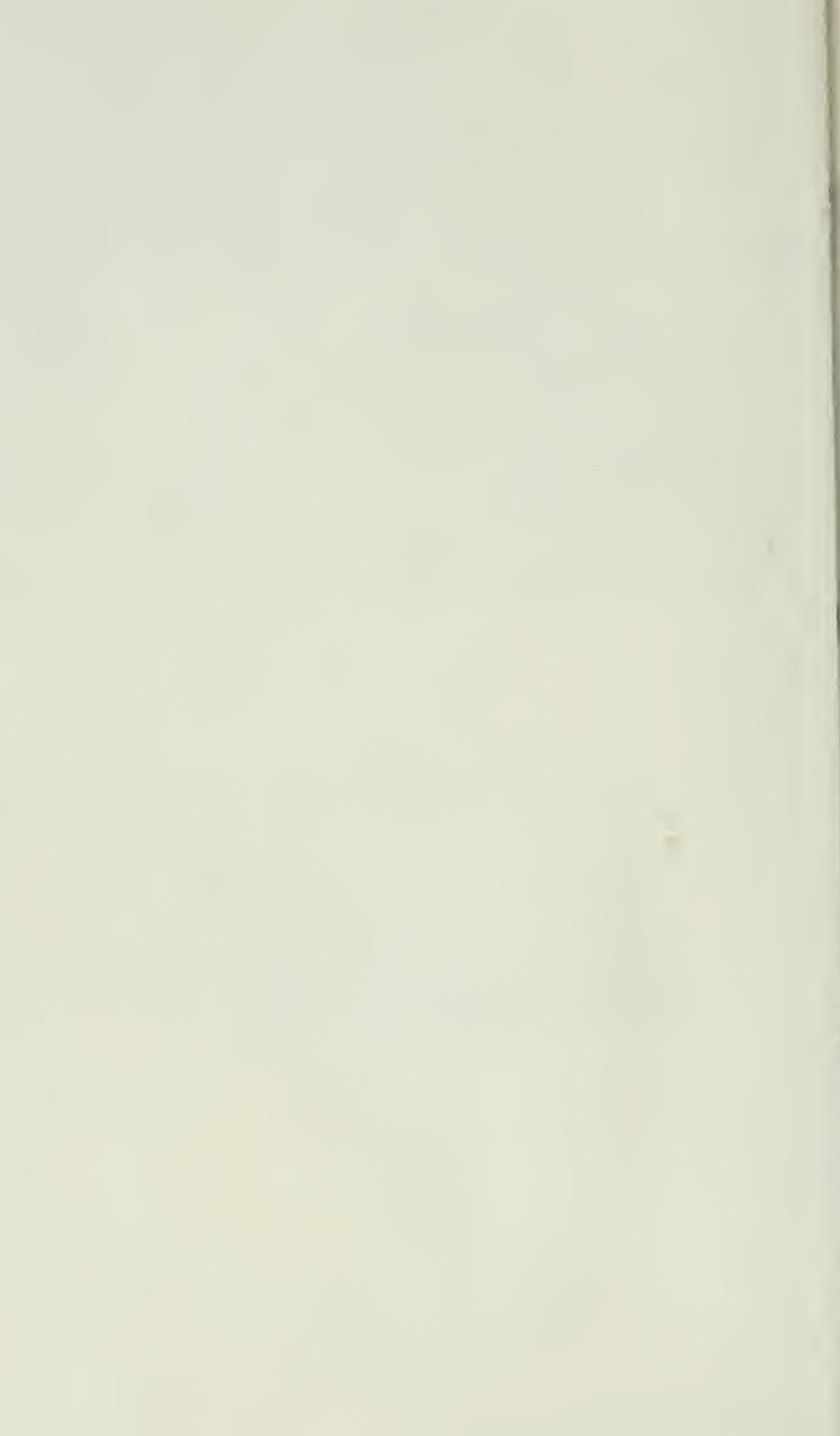
You are further authorized in accordance with the rules of the bank, to deduct from the amount of the undersigned a monthly service charge for each month, and a charge for checks returned because of insufficient funds.

N.B. PLEASE READ  
CAREFULLY BEFORE SIGNING

TEL-112 12-45

(Signature)

(Signature)



## EXHIBIT A

MERCHANDISE NATIONAL BANK  
CHICAGO, ILLINOIS

No. 6961

Date	Owners	Documents	Date of Item	Due	Amount
11-15-48	5 drafts - Frank C. Lofemic Bank of America NY & SA Bakersfield, California	5 drafts - Frank C. Lofemic Bank of America NY & SA Bakersfield, California	11-6-48	Sight	113,216. INC.

NO PROTEST

113,216.  
INC.

Total

COL. FEE

Total

113,216.  
INC.

our check is payment.

113,216.  
INC.

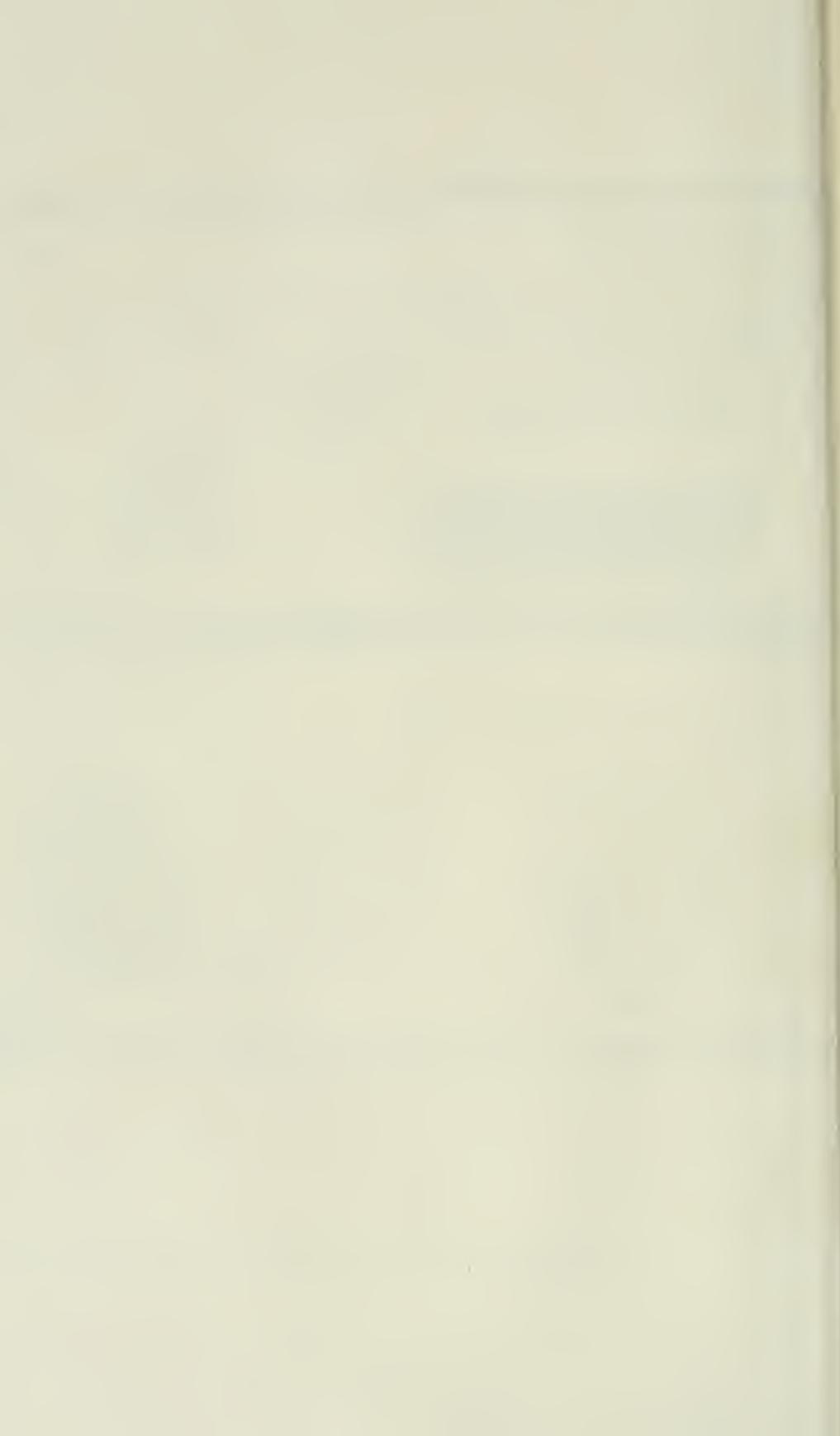
WE RETURN the above described item unpaid.

MERCHANDISE NATIONAL BANK  
CHICAGO, ILLINOIS

Ref b 10ie



[Endorsed]: Filed November 9, 1950.



[Title of District Court and Cause.]

ORDER

It Is Ordered and this does order that the motion of defendant to strike the amended complaint of plaintiff is denied.

Dated this 14th day of May, 1951.

/s/ W. D. MURRAY,  
United States District Judge.

[Endorsed]: Filed May 17, 1951.

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[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The above-entitled cause having been tried on June 15, 16, 19, 20, 21, 22, 23, 24, 26 and 29, 1950, before the Honorable William D. Murray, United States District Judge, sitting without a jury, and the respective parties being represented by counsel, and the Court having received evidence, both oral and documentary, and having heard oral argument and considered the briefs of the parties, now makes and orders filed its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That at all times herein mentioned plaintiff Merchandise National Bank of Chicago was and is a

national banking association organized and existing under the laws of the United States, located in the State of Illinois, and having its principal place of business in Chicago, Illinois.

## II.

That at all times herein mentioned defendant Bank of America National Trust and Savings Association was and is a national banking association organized and existing under the laws of the United States, located in the State of California, with its head office and principal place of business in San Francisco, California, in the Northern District of California wherein it resides and is doing business.

## III.

That within the meaning of Section 1348 of Title 28, United States Code, at all times herein mentioned the plaintiff was and is a citizen of the State of Illinois, and defendant was and is a citizen of the State of California; that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

## IV.

That throughout the year 1948 plaintiff had a deposit account with the defendant with a large credit balance in plaintiff's favor; that during the existence of that account, defendant from time to time sent to plaintiff for collection checks drawn upon the plaintiff; that in such cases, defendant was authorized by plaintiff to charge plaintiff's said

account with the amount of the checks, and would so charge the account only upon actual receipt from the plaintiff of a written authorization to do so, in the form of an outstanding and unrevoked credit memorandum or advice of credit; that this was the uniform custom, practice and arrangement between plaintiff and defendant and was observed by defendant at all times until November 19, 1948.

### V.

That in 1948 to and through the month of November, a corporation named United Produce Company had an account with the plaintiff.

### VI.

That on November 19, 1948, and for several months prior to that date United Produce Company had an account with defendant at its East Bakersfield Branch in Bakersfield, California (hereafter referred to as defendant's branch); that United Produce Company maintained that account in the name of "Frank C. Lofendo" (hereinafter referred to as "Lofendo"), but the account was in fact an account of United Produce Company, although maintained in the name of "Lofendo"; that it will hereafter be referred to as the "Lofendo account," but only for convenience.

### VII.

That from time to time United Produce Company drew checks on its account with the plaintiff payable to "Lofendo," endorsed them with the name of "Lofendo" and delivered them to defendant's

branch, and they were sometimes received for deposit in its account, the so-called "Lofendo account," and sometimes for collection; that while the payee on those checks was designated "Frank C. Lofendo," United Produce Company was in fact the payee using the name "Lofendo" to designate itself; that from time to time United Produce Company drew checks on its said "Lofendo account" at defendant's branch payable to itself under the designation "United Produce Co." and delivered them to the plaintiff for deposit to its account with plaintiff or for collection; that upon delivering such checks to plaintiff for collection, United Produce Company falsely represented to plaintiff that the checks were actual remittances from a natural person named "Lofendo," that "Lofendo" was a debtor of United Produce Company, and that the checks were payments received by United Produce Company from Frank C. Lofendo on account of debts owing to it from him arising from the sale of produce; that the purpose of United Produce Company in maintaining the "Lofendo account" and in drawing checks on its two accounts in the manner just stated was to cheat and defraud plaintiff; that while at all times referred to in these findings there was a natural person named Frank C. Lofendo, that person had no interest or claim in said "Lofendo account" or in any checks drawn by United Produce Company on the plaintiff payable to "Frank C. Lofendo" or in any of their proceeds.

## VIII.

That United Produce Company's account with plaintiff was maintained under several writings which together constituted an agreement defining the terms of the relationship between United Produce Company and plaintiff; that under that agreement checks received by plaintiff from United Produce Company drawn on the "Lofendo account" and represented to be remittances from "Lofendo" were received for collection only, and conditional credits in the amount of the checks were entered in the United Produce Company account with plaintiff subject to charge-back at any time before actual collection of the funds.

## IX.

That between November 4 and November 12, 1948, plaintiff received from United Produce Company over \$500,000 of checks drawn by United Produce Company on its "Lofendo account" with defendant, as stated above, and conditional credits had been entered in United Produce Company's account with plaintiff as a result thereof; that such checks were in fact fraudulent, and there were no funds in defendant's branch, on which they were drawn, to meet them, as United Produce Company well knew; that concurrently United Produce Company was obtaining credits from the plaintiff on the basis of assignments as collateral of fictitious and non-existent accounts receivable under the fraudulent representation that they were actual accounts due to United Produce Company from debtors as the result of sales of merchandise.

## X.

That on November 12, 1948, and on November 15, 1948, as a result of the foregoing frauds perpetrated by United Produce Company on plaintiff, there was an apparent credit balance on the face of United Produce Company's account with plaintiff, but in fact there was no actual credit balance on November 12th or at any time thereafter and instead there was an overdraft of over \$500,000.

## XI.

That under date of November 8, 1948, United Produce Company drew a certain 6 checks on its account with plaintiff payable to itself under the name of "Lofendo," totaling \$113,216.50; that on November 13, 1948, United Produce Company presented these checks to defendant's branch; that defendant declined to receive the checks for deposit or to give credit thereon to the "Lofendo" account and did not do so; that instead, it accepted the checks only as agent for collection; that on the same day, November 13, 1948, defendant mailed the 6 checks by a "collection letter" to the plaintiff for collection.

## XII.

That said 6 checks and collection letter arrived at the plaintiff's offices on November 15, 1948; that they never were in fact paid or collected; that United Produce Company did not then or thereafter or at any time in November, 1948, have any funds in the account with which to pay the 6 checks or against which they could be collected.

## XIII.

That when the 6 checks for \$113,216.50 arrived at plaintiff's office on November 15, 1948, employees of plaintiff, deceived and misled by reason of the facts found above and the fraud perpetrated by United Produce Company, and acting under the mistaken belief that there were funds in the account sufficient to pay the checks, marked the 6 checks "paid," made bookkeeping entries on plaintiff's own books to record the occurrences, and mailed to the defendant a written paper called an "advice of credit" to the effect that the 6 checks had been collected; that plaintiff did not notify United Produce Company of the occurrence and never surrendered the 6 checks to it.

## XIV.

That on November 17, 1948, plaintiff discovered the fraud that United Produce Company had perpetrated on it and the fact that United Produce Company's account was without funds on November 15th with which to pay the 6 checks, and it discovered the mistake committed on November 15, 1948, in sending out the advice of credit, marking the checks paid, and in making the several bookkeeping entries referred to above; that thereupon, on that day, plaintiff telephoned to defendant and informed the defendant that the advice of credit had been sent out by mistake and as a result of a fraud perpetrated by United Produce Company; that plaintiff further advised defendant that the checks had

in fact not been collected or paid and that United Produce Company had defrauded the plaintiff of a very large sum of money; that at the time of the telephone conversation the defendant had not yet received the advice of credit and did not know that it had been sent out; that in that conversation plaintiff inquired whether the advice of credit had been received, was informed by defendant that it had not, and plaintiff thereupon informed defendant that the advice of credit was rescinded and revoked, and in the said telephone conversation, the defendant agreed with plaintiff not to act upon the advice of credit if and when it should thereafter be received by defendant and agreed to return it to an emissary of plaintiff; that defendant did not know until November 22, 1948, that the 6 checks had been stamped paid, and it never knew until after the present lawsuit had been instituted that bookkeeping entries had occurred at the plaintiff's offices on November 15, 1948, with respect to the 6 checks; but on November 17, 1948, it inferred from the information that the advice of credit had been sent out by mistake, that the checks had been marked "paid" and that various bookkeeping entries had occurred at plaintiff's offices on November 15th.

## XV.

That on the next day, November 18, 1948, an officer of the plaintiff fully empowered to act for it arrived at defendant's head office and both orally and in writing advised defendant that the 6 checks had not been collected, that the advice of credit had

been sent out by mistake, that it was rescinded and revoked, and that the plaintiff rescinded any authority to the defendant to make any charge to plaintiff's account with defendant in reliance on the advice of credit when and if received; that on the same day defendant agreed that it would not act upon the advice of credit when received, that it would return the advice of credit to plaintiff, and that plaintiff should return the 6 checks to defendant; that on the same day plaintiff again advised defendant orally and in writing that United Produce Company had defrauded plaintiff of a sum in excess of \$500,000 by the means and instrumentality of fraudulent and fictitious checks drawn by United Produce Company on the account maintained at defendant's branch in the name of Frank C. Lofendo, and that Lofendo was a participant in the fraud.

## XVI.

That on the next day, November 19, 1948, plaintiff returned to the defendant the 6 checks after marking them with the notation "Cancelled in Error," and it reversed the various bookkeeping entries that had been made on November 15, 1948, on its own books relative thereto.

## XVII.

That defendant did not receive the advice of credit relative to the 6 checks for \$113,216.50 until November 19th; that not until subsequently, as hereafter found, did the defendant give or enter any credit for any part of the 6 checks or the \$113,216.50

to the "Lofendo account"; that at no time did the defendant in any way take any action whatsoever in reliance on the advice of credit relative to the 6 checks or in reliance on the supposed collection or payment of the said checks, and in no way at any time did it ever change its position or suffer any prejudice in reliance on any supposition that the said 6 checks or any of them had been collected or paid.

### XVIII.

That at no time did defendant give anything of value to anyone for the said 6 checks or any of them or any part thereof.

### XIX.

That despite the revocation and rescission of the advice of credit relative to the 6 checks, and despite defendant's agreement not to act on the advice of credit when received but to return it to the plaintiff, all as found above, defendant on November 20, 1948, after receiving the advice of credit on November 19, 1948, purported, as of the end of the day on November 19th, to charge the plaintiff's deposit account with the sum of \$113,216.50 and to credit a like amount to the "Lofendo account"; that the said charge against the account of the plaintiff was made without any authority from plaintiff to do so, contrary to plaintiff's instructions already received by defendant and already agreed to by it, and without any legal right, and it was wholly insufficient to reduce the defendant's indebtedness to the plaintiff by any amount whatever; that on November 20th

as of November 19th, defendant made entries on its own records purporting to show collection and payment of the 6 checks for \$113,216.50 as of November 19, 1948.

## XX.

That as early as October 22, 1948, defendant became suspicious that the "Lofendo account" at its branch was being maintained and operated as part of a check kiting operation with United Produce Company; that on that day it gave instructions to its employees that thereafter they were not to accept for immediate credit any checks drawn by United Produce Company to the order of "Lofendo" but were to accept any such checks for collection only, were to give credit only when collection was actually effected and had become final by receipt of good funds, and were not to permit "Lofendo" to draw against any items until so collected; that defendant did not fully observe these instructions until November 10, 1948; that on November 10, 1948, defendant became positive that the transactions going on between "Lofendo" and United Produce Company were not ethical but were part of some dishonest scheme; that on that day defendant reiterated imperative instructions that no checks of United Produce Company drawn to the order of "Lofendo" and tendered to defendant for deposit in the "Lofendo account" were to be accepted for immediate credit, that they were to be accepted by the defendant as agent for collection only, that no credit was to be given to the "Lofendo account" until final collection of the checks was actually effected and good funds

received, and that no withdrawals were to be permitted against any items until such collection; that at the time of the issuance of these instructions on October 22, 1948, and again on November 10, 1948, defendant had a substantial collected balance in the "Lofendo account," had permitted no overdrafts on the account, had paid out no funds against any apparent but as yet uncollected balance, and it had sustained no loss by reason of anything which had theretofore happened.

## XXI.

That subsequent to said instructions of November 10, 1948, and on November 16, 1948, United Produce Company presented to the defendant at its branch 5 checks totaling \$97,207.00 drawn by United Produce Company to the order of "Lofendo"; that contrary to its own instructions, defendant negligently and carelessly entered an immediate credit to the "Lofendo account" in the sum of \$97,207.00, as of November 15th, and immediately on the same day honored checks drawn by United Produce Company (using the name of Lofendo) on the said account and paid out funds in the amount of \$109,569.15; that immediately prior to the charge of \$109,569.15 there stood to the credit of the account only \$13,061.17 of collected funds, plus the credit of \$97,207.00 of uncollected funds; that the defendant thus paid out \$96,507.98 against uncollected funds.

## XXII.

That upon receipt by the defendant of the said checks for \$97,207.00, it sent them by a cash letter

to its Chicago correspondent, Continental Illinois National Bank and Trust Company; that late on November 18, 1948, after the close of business, and after it had already agreed with plaintiff to return the advice of credit for \$113,216.50 when received, the defendant received word by telegram from Continental Illinois National Bank and Trust Company that the checks for \$97,207.00 had been rejected for lack of funds; that upon receiving this telegram the defendant examined its records, and its officers then learned that by reason of the negligence of its own employees it had given immediate credit to the "Lofendo account" for \$97,207.00 on November 15, 1948, had on that day immediately honored checks against that credit as stated above, and that there were insufficient funds in the "Lofendo account" to cover a charge back of the rejected checks for \$97,207.00; that defendant thereby learned that it had sustained a large loss.

### XXIII.

That defendant's said loss was in no way connected with the 6 checks for \$113,216.50 or anything that had occurred with respect to those 6 checks either at the defendant's offices or at the plaintiff's offices or with anything that had been done relative thereto by the plaintiff or the defendant; that the loss was the sole and proximate result of defendant's own carelessness and negligence, as aforesaid.

### XXIV.

That defendant, ignoring plaintiff's revocation

and rescission of the advice of credit relating to the \$113,216.50, violating its agreement with plaintiff not to act upon the advice of credit when received but to return it, and seizing advantage of the advice of credit which had finally arrived on November 19, 1948, charged the account of plaintiff in the sum of \$113,216.50 and credited that sum to the "Lofendo account," and concurrently charged the "Lofendo account" in the sum of \$97,207.00, all for its own benefit.

## XXV.

That under date of November 6, 1948, United Produce Company drew 4 checks on its account with plaintiff payable to itself, under the name of "Lofendo," totaling \$89,813.10; that on November 10, 1948, United Produce Company presented these checks to the defendant at its branch; that pursuant to the instructions which defendant had laid down on that day, it refused to accept these checks for deposit to the account of "Lofendo" or to give credit for them to the "Lofendo account" and did not do so; that instead it accepted the checks only as agent for collection; that on the same day defendant mailed the four checks by a collection letter to plaintiff for collection; that the four checks and the collection letter covering them arrived at the plaintiff's offices on November 12, 1948; that United Produce Company did not have on that day or at any time thereafter any funds in its account with the plaintiff with which to pay said checks or against which they could be collected, but by reason of the frauds perpetrated by United Produce Company

on plaintiff, as found in Paragraphs VII to X, inclusive, above, there was an apparent credit balance in said account; that on November 12, 1948, employees of plaintiff, deceived and misled by reason of the facts found above and the fraud perpetrated by United Produce Company, and acting under the mistaken belief that there were funds in the account sufficient to pay the four checks, mailed to the defendant an advice of credit to the effect that the four checks for \$89,813.10 had been collected; that thereafter, on November 17, 1948, when the plaintiff telephoned to the defendant as found in Paragraph XIV above, defendant stated to plaintiff that only two collection letters theretofore sent by defendant's branch to the plaintiff were outstanding; one for the \$113,216.50 and a later one for \$52,379.00, and that there was a balance of only \$699.02 in the "Lofendo account"; that plaintiff reasonably assumed from this statement that the advice of credit for \$89,813.10 had already been received and acted upon by the defendant and that in reliance thereon the defendant had changed its position; that consequently, neither then or on November 18, 1948, did plaintiff speak or write to defendant relative to the \$89,813.10; but in fact, at the time of said telephone conversation the advice of credit for \$89,813.10 had not yet been acted upon by defendant in any way whatsoever; that defendant did not at any time, either theretofore or thereafter, change its position in any way to its detriment in reliance upon said advice of credit; that the said advice of credit had been received by the defendant on No-

vember 16, 1948, but it was not acted upon until November 18, 1948, and then only in the circumstances found below in Paragraphs XXVI, XXVII and XXVIII.

## XXVI.

That on November 15, 1948, three checks drawn on the "Lofendo account" totaling \$75,586.86 arrived at defendant's branch under cover of cash letters; that at the time of arrival, there were not sufficient funds in the account to pay them, but defendant's employees negligently failed to reject the checks; that on November 16, 1948, the posting to the "Lofendo account" as of November 15, 1948, of the checks for \$97,207.00, referred to in Paragraph XXI above, created an apparent balance against which the checks for \$75,586.86 could have then been charged; that had this charge been made, the apparent credit balance in the account would have been reduced so that there would have been no balance, even apparent, against which defendant could have honored the checks for \$109,569.15 received on November 16, 1948, as stated in Paragraph XXI above, and it would not have done so; but defendant failed to charge the checks for \$75,586.86 against the "Lofendo account" and permitted them to continue to lie around its branch.

## XXVII.

That the advice of credit relative to the checks for \$89,813.10 arrived at defendant's branch, after the charge for \$109,569.15 had been made; that three

days later, on November 19, 1948, defendant charged the sum of \$89,813.10 against plaintiff's deposit account with it, and on November 18, 1948, it entered a credit to the "Lofendo account" for \$89,-813.10; that defendant predicated the charge against plaintiff's account as of November 18, 1948, and it predicated the credit to the "Lofendo account" as of November 17, 1948; that until that credit was so entered, there were not sufficient funds in the "Lofendo account" against which to charge the checks for \$75,586.86 which had theretofore been paid, and the purpose of making the entry was to supply funds against which to make the charge; that thereupon the checks for \$75,586.86 were charged against the credit so created in the account.

## XXVIII.

That before anything was done by the defendant on the basis of said advice of credit for \$89,813.10, plaintiff had communicated with defendant on November 17, 1948, as found above in Paragraph XIV, and again on November 18th, as found above in Paragraph XV, and the plaintiff on both occasions informed the defendant that United Produce Company had defrauded the plaintiff of a large sum of money exceeding \$500,000 and had done so by means of fictitious and fraudulent checks drawn on the "Lofendo account"; that consequently, defendant never became a bona fide purchaser for value of the \$89,813.10 or any part thereof; that not until the trial of this cause did plaintiff discover that defendant was not a bona fide purchaser for value of

said sum and that it had never changed its position to its detriment in reliance on the said advice of credit for \$89,813.10; that thereupon the court granted leave to plaintiff to amend its complaint, and plaintiff did amend its complaint to seek recovery of said sum.

## XXIX.

That it is not true that plaintiff at any time permitted or allowed United Produce Company to incur obligations to it, not falling within the exceptions enumerated in Revised Stats., Sec. 5200 (Title 12, U. S. C., Section 84), in excess of 10% of the amount of plaintiff's capital stock actually paid in and unimpaired plus 10% of its unimpaired surplus; that it is not true that any act of plaintiff in allowing United Produce Company to incur obligations of any kind to it or anything else ever done or omitted by plaintiff in any way proximately caused or contributed to any loss sustained by the defendant in any amount whatever; that it is not true that the defendant, or plaintiff, or anyone else, has ever suffered any loss by reason of the 6 checks for \$113,216.50; that the plaintiff has been damaged by reason of defendant's refusal to pay to plaintiff the balance in plaintiff's account with defendant, and one of defendant's reasons for refusing to pay to plaintiff the amount of the balance was that defendant was entitled to charge the sum of \$113,216.50 against plaintiff's account; but no one has suffered any loss by reason of the 6 checks for \$113,216.50, since the defendant paid out no funds and did no act in any way to its detriment in reliance on said

6 checks or anything connected therewith; that it is not true that the plaintiff ever made any representation to the defendant to induce it to pay any check or checks drawn on the "Lofendo account" to the order of United Produce Company or to induce the defendant to give anyone whatsoever credit for any check or checks drawn by United Produce Company on the plaintiff payable to "Lofendo" or to anyone else; that it is not true that, in reliance on any representation of the plaintiff, defendant ever paid any checks drawn on the "Lofendo account" or ever gave the "Lofendo account" credit for checks of United Produce Company.

### XXX.

That on November 23, 1948, plaintiff made demand on defendant to pay to the plaintiff the entire amount of the credit balance in plaintiff's account with defendant; that at that time the account had a credit balance of \$386,577.61; that between November 23, 1948, and February 18, 1949, defendant paid to plaintiff \$294.54, and on February 18, 1949, it paid to plaintiff the sum of \$183,235.47; but that defendant has failed and refused and still fails and refuses to pay to plaintiff any other sum, and there is still due, owing and unpaid to plaintiff the principal sum of \$203,047.60; that defendant is further indebted to plaintiff for interest at the legal rate of 7% per annum on the sum of \$183,235.47 from November 23, 1948, to and including February 18, 1949, and for interest at the legal rate on \$203,047.60 from November 23, 1948, until paid.

From the foregoing facts the Court draws the following

### Conclusions of Law

#### I.

That this Court has jurisdiction hereof.

#### II.

That plaintiff and defendant were the agents of “Lofendo” in effecting collection of the checks forwarded for collection.

#### III.

That the bookkeeping entries of plaintiff did not constitute payment of checks sent for collection.

#### IV.

That the rescinded and cancelled advice of credit is not and cannot be the basis for credit, claim, charge or set-off by defendant against plaintiff.

#### V.

That defendant never acted to its detriment in reliance upon the rescinded and cancelled advice of credit.

#### VI.

That defendant did not become a debtor of “Lofendo” in connection with the 6 checks totaling \$113,216.50, or the 4 checks totaling \$89,813.10.

#### VII.

That defendant’s charge of \$113,216.50 against the account of plaintiff was made without authority or

right and did not reduce defendant's indebtedness to plaintiff.

### VIII.

That after the 17th day of November, 1948, defendant had no authority or right to pay to "Lofendo" or itself, in discharge of any obligation of "Lofendo" to it, the sum of \$89,813.10.

### IX.

That in connection with the collection of the checks, defendant, not having acted in reliance on any act or omission of plaintiff, could not have any greater rights than its principal "Lofendo."

### X.

That defendant is indebted to plaintiff in the sum of \$203,047.60, plus \$3,069.50 interest on the sum of \$183,235.47, from November 23, 1948, to and including February 18, 1949, together with an additional sum as interest at the rate of 7% per annum on \$203,047.60 from November 23, 1948, until paid, and on \$3,069.50 from February 18, 1949, until paid, together with its costs of suit herein incurred.

### XI.

That upon agreement of counsel, plaintiff having prevailed in its action, there does not exist any fund or balance in the "Lofendo account" to which the trustee in bankruptcy would be entitled and therefore the so-called interpleader counterclaim of defendant and the trustee's answer and claim in response thereto should be dismissed.

Let a form of judgment be accordingly prepared and submitted to the Court for approval.

Done and dated this 14th day of May, 1951.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed May 17, 1951.

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In the District Court of the United States, for the Northern District of California, Southern Division

No. 28721-R

MERCHANDISE NATIONAL BANK OF CHICAGO, a National Banking Association,

Plaintiff,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association,

Defendant.

### JUDGMENT

The above-entitled cause having been tried on June 15, 16, 19, 20, 21, 22, 23, 24, 26 and 29, 1950, before the Honorable William D. Murray, United States District Judge, sitting without a jury, and the respective parties being represented by counsel, and the Court having received evidence, both oral and documentary, and having heard oral argument and

considered the briefs of the parties, and having made and filed herein its Findings of Fact and Conclusions of Law pursuant to R.C.P. Rule 52,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that plaintiff, Merchandise National Bank of Chicago, a national banking association, do have and recover of and from defendant, Bank of America National Trust and Savings Association, a national banking association, the sum of Two Hundred Six Thousand One Hundred Seventeen and 10/100 Dollars (\$206,117.10), plus interest at the rate of seven per cent (7%) per annum on Three Thousand Sixty-Nine and 50/100 Dollars (\$3,069.50) thereof from February 18, 1949, to and including the day of entry of this judgment, plus, also, interest at the rate of seven per cent (7%) per annum on Two Hundred Three Thousand Forty-Seven and 60/100 Dollars (\$203,047.60) thereof from November 23, 1948, to and including the day of entry of this judgment, together with plaintiff's costs of suit herein incurred to be taxed in the manner provided by law and the rules of court, the entire judgment to bear interest from the date of entry at the rate of seven per cent (7%) per annum until paid, and plaintiff shall have execution therefor;

It Is Further Ordered, Adjudged and Decreed that the defendant, Bank of America National Trust and Savings Association, do have and recover nothing from the plaintiff by reason of said defendant's counterclaims or any of them;

It Is Further Ordered, Adjudged and Decreed that the interpleader counterclaim of said defendant,

Bank of America National Trust and Savings Association, and the claim and response thereto of the interpleaded defendant, Eugene J. O'Riley as Trustee in Bankruptcy of the Estate of United Produce Company, a corporation, Bankrupt, be and the same are hereby dismissed, together with the answer of said interpleaded defendant to the complaint and its reply to said interpleader counterclaim.

Done and dated this 6th day of June, 1951.

/s/ W. D. MURRAY,

United States District Judge.

Approved as to form pursuant to Rule 5(d) of the local rules.

S. B. STEWART, JR.,

G. D. SCHILLING,

ERSKINE, PILLSBURY &

TULLEY,

By /s/ MORSE ERSKINE,

Attorneys for Defendant Bank of America National Trust and Savings Association.

/s/ JOHN L. BRADLEY,

CRIMMINS, KENT, DRAPER &  
BRADLEY,

Attorneys for Interpleaded Defendant Eugene J. O'Riley as Trustee, etc.

Costs taxed \$1,573.14, June 14, 1951.

Receipt of copy acknowledged.

Entered June 8, 1951.

[Endorsed]: Filed June 8, 1951.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED FINDINGS OF  
FACT AND CONCLUSIONS OF LAW

[Attached Note]: We respectfully request that the preparation of these proposed findings on the assumption that defendant's motion to strike the amended complaint will not be granted will be without prejudice to defendant's contention that such motion should be granted.

/s/ MORSE ERSKINE.

The above-entitled cause having been tried on June 15th, 16th, 19th, 20th, 21st, 22nd, 23rd, 24th, 26th and 29th, 1950, before the Honorable William D. Murray, District Judge, sitting without a jury, and the court having received evidence, both oral and documentary, and having heard oral argument and considered the briefs of the parties, the Court now makes the following

Findings of Fact

I.

Introductory Findings

1. At all times herein mentioned plaintiff, Merchandise National Bank of Chicago, was and is a national banking association organized and existing under the laws of the United States, located in the State of Illinois, and having its principal place of business in Chicago, Illinois.

2. At all times herein mentioned defendant, Bank of America National Trust and Savings Association was and is a national banking association organized and existing under the laws of the United States, located in the State of California, with its head office and principal place of business in San Francisco, California, in the Northern District of California, wherein it resides and is doing business. Defendant has branches throughout the State of California, one of which is located in Bakersfield, California, and is known as the East Bakersfield Branch of defendant. This East Bakersfield Branch of defendant will be referred to as "the branch."

3. Within the meaning of Section 1348 of Title 28, USC, at all times herein mentioned the plaintiff was and is a citizen of the State of Illinois, and defendant was and is a citizen of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

4. On November 19th, 1948, and for more than five months prior to that date United Produce Company, hereinafter referred to as "United," was a corporation with its principal place of business in Chicago, Illinois, engaged in the business of a commission merchant, that is in the business of buying at wholesale vegetables, fruit and other produce and selling such produce to wholesale and retail distributors. And for a period of at least five months prior to November 19th, 1948, Frank C. Lofendo was an agent of United employed by it to purchase

from producers for its account vegetables, fruit and other produce.

5. The period commencing on July 1st, 1948, and continuing to November 19th, 1948, will for convenience be referred to herein at times as "said period." During the said period United had a commercial account with plaintiff, and plaintiff was loaning United \$200,000.00 secured by assignments by United to plaintiff of all the former's accounts receivable, and plaintiff was discounting drafts drawn by United on others. This loan by plaintiff to United was the legal limit which plaintiff under section 84 Title 12 USC could lend to any one person.

6. During said period there was a commercial account in the branch standing in the name of Lofendo.

7. During said period United and Lofendo were engaged in what is known in the banking business as "check kiting." The practice of check kiting, in which, as just stated, United and Lofendo were engaged during said period, can be described as follows: Lofendo, as the agent and tool of United, would draw a check upon the branch, and would deliver such check to United so that United could deposit it to its account with plaintiff. Plaintiff upon the deposit of such check with it would credit the account of United with plaintiff with the amount of such check. Contemporaneously, United would draw a check payable to Lofendo on its account with plaintiff and would cause such check to be deposited to the credit of Lofendo in said account

of Lofendo with the branch within such time so that when such check of Lofendo drawn to the order of United was presented to the branch for payment, there would be funds to his credit in the branch to pay it. One side of the kiting operation was the side in which checks of Lofendo drawn to the order of United, like the check of Lofendo just mentioned, were deposited to the credit of United in its said account with plaintiff; and the other side of the kiting operation was the side in which checks of United drawn to the order of Lofendo, like the check of United just mentioned, were deposited to the credit of Lofendo in his said account with defendant. In the kiting operation many checks during said period were used on both sides, that is many checks drawn by Lofendo on his account with the branch to the order of United were deposited in and credited to the account of United with plaintiff and many checks drawn by United on its account with the plaintiff to the order of Lofendo were deposited in and credited to the account of Lofendo with the branch. And as will be stated later United also used its loan account with plaintiff to carry on the kite.

8. Throughout the year 1948, plaintiff had a deposit account with defendant with a credit balance therein in favor of plaintiff. By its original complaint on file in this action plaintiff claimed that at the close of business on November 23rd, 1948, the credit balance in said account in its favor was \$296,-451.97, whereas, by its amended answer on file in this action defendant claims that as of the close of

business on that date the credit balance in said account in plaintiff's favor was the sum of \$183,235.47. The difference between these amounts is \$113,216.50, which difference was represented by six checks, hereinafter referred to as "the six checks," payable to Lofendo and drawn by United on its commercial account with United. On November 13th, 1948, the branch received from Lofendo through the mail the six checks for deposit, and on that date the branch mailed them to plaintiff with a collection letter instructing plaintiff to credit the account of defendant and notify the branch. (As all of the events hereafter referred to in these findings occurred in 1948 the court in hereafter stating dates in these findings will not specify the year but only the month and day; but it should be understood that all the dates herein after specified are dates in 1948.) One of the main issues in this case is whether plaintiff paid the six checks and if plaintiff paid them whether it has the right to recover such payment from defendant.

9. By its amended complaint filed by plaintiff at the conclusion of the trial, plaintiff claimed that at the close of business on November 23rd, 1948, the amount to its credit in its account with defendant was not \$296,451.97, as claimed by the original complaint, but was \$386,283.07. The difference between these two last amounts is \$89,831.10, which was represented by four check, hereinafter referred to as "the four checks," drawn by United on plaintiff, payable to Lofendo. On November 10th, 1948,

the branch received from Lofendo through the mail the four checks for deposit and on that day the branch mailed them to plaintiff with a collection letter instructing the plaintiff to credit the account of defendant and notify the branch. The second main issue in the case is whether plaintiff paid the four checks and if it paid them, whether it has the right to recover such payment from defendant.

## II.

Plaintiff Paid Both the Six Checks and the Four Checks and When It Paid Them Defendant's Agency to Present and Collect Them Terminated and Plaintiff Became Indebted to Defendant and Defendant to Lofendo for the Amount of Them.

10. Plaintiff received the four checks, together with the collection letter accompanying them, on November 12th; and on that date plaintiff paid the four checks by charging them against the United's commercial account, crediting defendant with the amount of the four checks on plaintiff's books as requested by the collection letter and by perforating the checks with the stamp "paid" and the date of November 12th, and on that date it mailed the branch four instruments each of which referred to one of the four checks and bore plaintiff's stamp to the effect that the check referred to therein had been paid on November 12th. The last mentioned instruments, which will be referred to herein as "advices of credit," were received by the branch on November 16th.

11. Plaintiff received the six checks, together with the letter accompanying them, on November 15th; and on that date it paid them by charging them against United's commercial account and by crediting defendant on its books with the amount of the six checks as requested by the collection letter and by perforating the checks with the stamp "paid" and the date of November 15th. Although the collection letter accompanying the six checks requested plaintiff to mail to the branch an advice that the six checks had been paid, plaintiff on November 15th mailed to the San Francisco head office of defendant an instrument which referred to the six checks and bore plaintiff's stamp to the effect that the checks referred to therein had been paid on November 15th. The last mentioned instrument will also be referred to herein as an "advice of credit." The last mentioned advice of credit was received at the San Francisco head office of defendant on November 18th, but that department of defendant had no function to perform with respect to it other than to treat it as a misrouted item and forward it by mail to the branch where the collection had originated. This was done as a matter of routine by the clerical staff. The last mentioned advice of credit arrived at the branch on November 19th.

12. When the branch received the four checks and the six checks through the mail for deposit and elected to send them to plaintiff for collection instead of crediting the amount thereof to Lofendo's account, defendant became an agent of Lofendo for

the presentaiton and collection of both sets of checks. When Plaintiff paid the four checks and credited defendant with the amount thereof, the agency of defendant to present and collect the four checks was thereupon terminated and plaintiff thereupon became indebted to defendant for the amount of the four checks and defendant thereupon became indebted to Lofendo for the amount thereof; and when plaintiff paid the six checks and credited defendant with the amount thereof, the agency of defendant to present and collect the six checks was thereupon terminated and plaintiff thereupon became indebted to defendant for the amount of the six checks and defendant thereupon became indebted to Lofendo for the amount thereof.

### III.

#### Plaintiff Was Negligent In not Having Discovered the Kite Long Prior to Its Payment of the Four and Six Checks.

13. The arrangement under which United carried on its business with plaintiff was substantially as follows: When on any day United had in its hands checks of debtors owing it accounts receivable assigned to plaintiff as security for plaintiff's loan to United, United would endorse such checks and deliver them to plaintiff together with a remittance sheet specifying the debtors who had delivered such checks to it and the amount of such checks. Plaintiff would thereupon apply such remittance (that is the aggregate amount of such checks) on account of United's indebtedness to it and on the same day

plaintiff would make an additional loan to United in the amount of such remittance so as to maintain United's indebtedness to it at \$200,000.00. Although plaintiff made United a new loan on each day that a remittance was received and applied on account of United's indebtedness the remittance was not a basis for such new loan, but such new loan was an independent transaction based on a new note and secured by new collateral consisting in the assignment of new accounts receivable.

14. When in these findings the expression, "checks on both sides of United's commercial account," is used it shall refer to checks drawn by Lofendo on his account with the branch payable to the order of United which were credited to United's commercial account with plaintiff and to checks drawn by United on its commercial account with plaintiff payable to the order of Lofendo which were charged against United's commercial account. Defendant's exhibit PP, which is a photostat of United's commercial account with plaintiff for the period commencing on July 1st to November 27th when the account was closed, shows that from July 1st to the end of October there were on many days checks on both sides of United's commercial account.

15. During the period (as stated in paragraph 5 the expression "said period," as used in these findings means the period from July 1st to November 19) Henry J. Reichwein was the cashier and vice-president of plaintiff and was the loan officer of plaintiff in charge of its business transactions with

the United, except that while Reichwein was away on his vacation during the period from September 20th to October 18th Allen R. Le Roy, another vice-president of plaintiff and one of its loan officers, was in charge of the account. Towards the end of September William F. Collins, who was at that time the cashier of plaintiff, after making a cursory examination of the United's account told Le Roy that in his opinion there was "a fair possibility" that United was engaged in a kite. Le Roy then investigated the account and told Collins that he agreed that United might be engaged in a kite and that the matter should be discussed with Raymond L. Redheffer, who was then the president of plaintiff. Collins and Le Roy then had a discussion with Redheffer about the matter. In this discussion Collins told Redheffer that in his opinion the account indicated a possibility of check kiting and Le Roy suggested to Redheffer that a more thorough examination be made of the account. Redheffer agreed that this should be done. William Edward Tague, who was at that time an assistant credit manager and chief field auditor of plaintiff, was then directed to investigate the books of United to determine (a) why United was drawing so heavily on uncollected funds, (b) the checks on both sides of the account and (c) from what source United was getting the funds which were being deposited to its credit in its commercial account.

16. Prior to the end of September Tague had been making periodical audits of United's books.

And Tague upon being instructed to make a special investigation of these books for said purposes did investigate them and made a report, dated October 1st, which was introduced in evidence as defendant's exhibit R. This report stated that United had advanced to three growers, Mazzie Farms, Jacks Fruit Company and Lofendo, during July, August and September \$1,976,285.62 and had received from them \$1,858,010.33. This report also stated that Gassman, an employee of United, had explained the checks on both sides by stating in effect that anyone of the three growers, Lofendo, for instance, would purchase produce and would then be reimbursed by United by means of a check from United and that Lofendo would then sell such produce and would collect the proceeds of the sale and would then send his check to United for such proceeds. This explanation contained in the report and its statement that United was making these large advances to the three growers should not have allayed any doubts in the minds of plaintiff's officers with respect to the kite suggested by Collins, but should have accentuated their doubts. This is so for the following reasons:

- (a) As United was in the business of buying, selling and shipping produce, it was unreasonable to believe that it would finance others to the extent to which the report stated that it was financing the three growers so that they could engage in such business. All that United would have received on such business of the three growers would have been a small commission.
- (b) As plaintiff was financing United by loans

up to plaintiff's legal limit and by discounting United's drafts in substantial amounts and as plaintiff expected to receive all of United's accounts receivable as collateral, it would have been unreasonable for plaintiff to acquiesce in United's making such large advances to growers in transactions from which plaintiff received no collateral.

(c) As United's capital was limited and as the frequent noon-day over-drafts in its account indicated a lack of working capital and as all the proceeds of its sales were going to plaintiff either under the assignments of its accounts receivable or by plaintiff's discounting of its drafts, plaintiff's officers should have had grave doubts respecting the source from which United was getting the funds to make the advances which the report stated it was making to the three growers.

(d) And Le Roy testified that one of the reasons why Tague was directed to make his special investigation was that as plaintiff by virtue of the assignments executed to it by United should have been receiving all of the proceeds of United's sale and by virtue of its discounts all the proceeds of United's drafts, he was puzzled to know where United was getting the checks being credited to its commercial account, and so the report should have increased Le Roy's bewilderment because the report showed that United was advancing funds in very substantial amounts without United having any source from which to make such advances.

17. Tague was negligent in the making of his audits and his special investigation leading to his

report of October 1st. If he had exercised reasonable care in making his audits and such investigation the kite would have been disclosed.

(a) Although Tague in his report of October 1st stated that United was making advances to Mazzie Farms, Jacks Fruit Company and Lofendo and was being reimbursed by them, the books of United which Tague must have examined to get these figures showed that United was making substantially all of these advances to Lofendo and was receiving substantially all of the repayments from Mazzie. If Tague had not been negligent in making his audits and said special investigation, he would have discovered this fact immediately upon examining the books; and when he discovered it, he would have known that something was radically wrong demanding further investigation; and such further investigation would have disclosed the kite.

(b) When United on any day would endorse and deliver to plaintiff checks of debtors received by it on account of accounts receivable, it would accompany such checks with a remittance sheet specifying the names of the debtors and the amounts of their checks. A comparison of the cash receipts book of United with the remittance sheets delivered by United to plaintiff during said period from July 1st to November 19th shows that on 109 occasions during said period the following was the fact: on each of such occasions the cash receipts book of United showed that it had received payments from debtors; the cash receipts book specified the names

of such debtors and the amounts paid by each of them; whereas the remittance sheet which was delivered to plaintiff and accompanied the checks representing such payments omitted the names of certain of such debtors and substituted the name of Lofendo for the omitted names and a check of Lofendo for the checks of the omitted debtors. This discrepancy could have been observed upon the most superficial comparison of the remittance sheets with the books of United. Tague was negligent in not noticing it; and if he had noticed it and had made an investigation of it, the kite would have been disclosed immediately.

18. On October 4th, after Tague had made his dubious report, Le Roy, who was then in charge of the account during Reichwein's absence, had a conference with Rosenthal, the secretary-treasurer of United, in which Le Roy told Rosenthal that United should cause the funds represented by checks on California banks which were being credited to United's account to be deposited to the credit of plaintiff in such banks and should have the California banks give telegraphic advice to plaintiff to that effect. Almost all of these checks were Lofendo checks payable to United. United did not follow this instruction of Le Roy. On October 6th Le Roy told Rosenthal that he should arrange that United should not draw on uncollected funds after October 13th. United then asked Le Roy to permit it to continue to draw on uncollected funds until October 18th, and Le Roy, with Redheffer's con-

currence, told it that it could continue this practice until that day. On October 18th, the day on which Reichwein returned from his vacation, Le Roy turned the supervision of the account back to Reichwein. On October 18th United had not stopped drawing on uncollected funds and so Reichwein on that day and on later days requested Rosenthal to have United stop this practice. But United did not stop drawing against uncollected funds in its commercial account until the end of October. (As will be stated later, although United discontinued drawing on uncollected funds in its commercial account at the end of October, it continued in effect to draw on uncollected funds after the end of October by the use of its loan account.)

19. Reichwein testified that at no time until United's collapse on November 17th was he aware that there were checks on both sides of the United's commercial account and that after his return from his vacation on October 18th Le Roy did not tell him that plaintiff had caused Tague to make a special investigation of United's books in order to investigate the fact that it was drawing heavily against uncollected funds and the checks on both sides of its commercial account. Whether this testimony of Reichwein is true or false it shows unusual negligence on his part. If Reichwein did not know that there were checks on both sides of United's commercial account until United's collapse on November 17th, he was extremely negligent. If after Reichwein returned from his vacation Le Roy did not call to

his attention Tague's report and did not tell him that Tague had been directed to make an investigation of the checks on both sides of United's commercial account, Le Roy was extremely negligent; whereas, if Le Roy did tell Reichwein these facts, Reichwein should have been alerted to the dangers involved in the situation and should have taken reasonable measures to find out what was going on. But Reichwein did nothing whatever with respect to the account except to give United the same directions which had been given United by Le Roy while Reichwein was on his vacation, that is directions to stop drawing on uncollected funds in its commercial account. But United did not even stop doing this until the end of October; and then as will be stated later, it continued to draw on uncollected funds by the use of its loan account.

20. And so the facts are that after Collins had given Le Roy and Redheffer his warning that United might be engaged in a kite and after Tague had made his dubious report, plaintiff did absolutely nothing to investigate the transactions between Lofendo and United giving rise to the checks on both sides; but that all plaintiff did was to direct United on several occasions to stop drawing upon uncollected funds; and that United despite these directions did not stop drawing on uncollected funds in its commercial account until the end of October. And during this time plaintiff was loaning United \$200,000.00, plaintiff's legal limit; and was discounting for United drafts in a substantial amount; and

during this time plaintiff had access to United's books and records and was in constant touch with its officers and employees. These facts in themselves show that plaintiff was grossly negligent in not having discovered the kite. But there are other facts which establish even more clearly that plaintiff was grossly negligent in this respect.

21. During the month of September the accounts receivable assigned by United to plaintiff aggregated \$1,056,338.16. Included in these assignments were assignments of accounts receivable of Lofendo to United aggregating \$43,305.00. The monthly assignment of August 28th assigning to plaintiff all the accounts receivable of United outstanding on that date showed that such accounts aggregated \$469,-050.13 and included accounts receivable of \$6,666.00 owing by Lofendo. During the month of September, the total remittances received by plaintiff from United on account of accounts receivable aggregated \$777,629.89; and during this month the total Lofendo remittances received by plaintiff aggregated \$341,-250.30, or about 44% of the aggregate. And so the records of plaintiff showed that at the end of August plaintiff held accounts receivable owing by Lofendo to United aggregating \$6,666.00 and during September it received Lofendo checks on account of assigned accounts receivable aggregating \$341,250.00, or about 44% of the aggregate payments received by it from United on account of accounts receivable in that month.

22. During the month of October the accounts

receivable assigned by United to plaintiff aggregated \$1,456,506.72. Included in these assignments were assignments of accounts receivable of Lofendo to United aggregating \$105,718.22. The monthly assignment of October 2nd, assigning to plaintiff all the accounts receivable of United outstanding on that date showed that such accounts aggregated \$475,334.28 and included accounts receivable of \$12,609.00 owing by Lofendo. During the month of October, the total remittances received by plaintiff from United on account of accounts receivable aggregated \$1,168,029.96; and during this month the total Lofendo remittances received by plaintiff aggregated \$899,909.64, or 80% of the total. And so the records of plaintiff showed that at the end of September plaintiff held accounts receivable owing by Lofendo to United aggregating \$12,609.00, and that during October it received Lofendo checks on account of assigned accounts receivable aggregating \$899,909.64, or about 80% of the aggregate payments received by it from United on account of accounts receivable in that month.

23. During the first sixteen days of November the accounts receivable assigned by United to plaintiff aggregated \$1,104,133.30. Included in these assignments were assignments of accounts receivable of Lofendo to United aggregating \$434,527.69. The monthly assignment of October 30th assigning to plaintiff the accounts receivable of United outstanding on that date showed that such accounts aggregated \$470,099.35 and included accounts re-

ceivable of \$7,350.00 owing by Lofendo. During the first sixteen days of November, the total remittances received by plaintiff from United on account of accounts receivable aggregated \$1,087,046.62; and during this month the total Lofendo remittances received by plaintiff aggregated \$998,326.98, or about 90% of the aggregate. And so the records of plaintiff showed that at the end of October plaintiff held accounts receivable owing by Lofendo to United aggregating \$7,350.00 and that during the first sixteen days of November it received Lofendo checks on account of assigned accounts receivable aggregating \$1,087,046.62, or about 90% of the aggregate payments received by it from United on account of accounts receivable in that month.

24. It thus appears that during September, October and the first seventeen days of November Lofendo checks were pouring into plaintiff's loan account in numbers and amounts which were most unusual. This fact, which was disclosed by the records of plaintiff, should have come to the attention of Reichwein, who was in charge of the account, and of Le Roy who was in charge of it during Reichwein's absence; and plaintiff was most negligent in not having discovered this fact; and if it had been discovered and investigated, the kite would have been disclosed at once.

25. As already stated, the practice of plaintiff in carrying on its business with United was that when United delivered to plaintiff checks of debtors owing assigned accounts receivable, plaintiff would apply

the amount of such checks on account of United's indebtedness to it and on the same day plaintiff would make a new loan to United equal to the amount of such checks, so as to maintain United's indebtedness to it at \$200,000.00. Plaintiff did not make such new loans to United on the basis of such remittances, but such new loans were independent transactions based on new notes and secured by the assignments of additional accounts receivable.

26. The result of this practice was that when plaintiff received a remittance of Lofendo checks, which were pouring into United's loan account during the months of September and October and the first seventeen days of November, plaintiff would make a new loan to United equal to the amount of the remittance and this new loan would be credited to United's commercial account. Although such Lofendo checks did not create credits in United's commercial account, still under this practice the delivery of such checks to plaintiff and their application by plaintiff to United's indebtedness to it led to new loans and the new loans to such credits. And so United was enabled to carry on the kite, not only by depositing Lofendo's checks to its credit in its commercial account, but also by delivering Lofendo checks to plaintiff as remittances and at the same time getting new loans and new credits. And likewise United was drawing on uncollected funds, not only by depositing Lofendo checks to its credit in its commercial account and drawing on the credits so created before such checks were collected, but

also by delivering Lofendo checks to plaintiff as remittances and at the same time getting new loans and new credits. Beginning about October 29th, the amount of the float with respect to the Lofendo checks received as remittances began to increase and increased more or less steadily to November 16th; and on November 15th this float amounted to the enormous total of \$602,535.61. In other words, on that day United was in effect drawing on uncollected funds in that amount.

27. The new loans made by plaintiff to United which by reason of the practice described in paragraph 25 were related to the Lofendo checks received by plaintiff as remittances increased from \$341,250.30 in September to \$899,900.69 in October and to \$998,326.98 during the first seventeen days of November. The making by plaintiff to United of new loans aggregating those large amounts related in the way just indicated to such Lofendo checks was negligent banking.

28. Although plaintiff was making new loans to United in amounts far in excess of plaintiff's legal limit of \$200,000.00, the net amount of its loans was kept at \$200,000.00 in the following manner: All the notes executed by United to plaintiff during any month to evidence the additional loans made by plaintiff to United during that month would mature on the fifth day of the following month and on their maturity such notes would be retired and paid by the application to them of the remittances delivered by United to plaintiff during the month during which such notes were executed. During

each month the difference on any day between the aggregate of remittances received during such month and the aggregate of the notes executed during such month was maintained at \$200,000.00. In other words, the remittances received during any month were considered as cash offsetting the indebtedness under the notes executed during any such month so that the net loan was maintained at \$200,000.00.

29. The facts stated in paragraphs 21 to 23 and in paragraphs 26 and 27 were all disclosed by plaintiff's records and therefore plaintiff is charged with knowledge of them. But as plaintiff was loaning United its legal limit of \$200,000.00 and was discounting for United drafts of United in substantial amounts (the outstanding drafts discounted by plaintiff for United averaged each day of said period from \$150,000.00 to \$200,000.00), the officers of plaintiff charged with the supervision of the account should have been aware of said facts. If such officers had been aware of said facts, even a superficial investigation of them would have led immediately to the discovery and termination of the kite. If such officers were aware of said facts and did nothing to investigate them, they were grossly negligent; but if on the other hand they were not aware of said facts they, as stated, should have been aware of them and their failure to be aware of them was grossly negligent.

30. During the month of July, there was a noon-day overdraft in the commercial ledger of United with plaintiff on eight days; in August on ten days;

in September on five days; in October on ten days; and from November 1st to November 16th on five days; and on each of these days on which a noon-day red balance was posted to United's account (which posting was done on the day succeeding the day as of which the entry was made) it was necessary for United to create credits to its account so that on the day of posting the noon-day overdraft would not on that day become an actual overdraft. Whenever there was a noon-day overdraft in United's commercial account the fact that there was such an overdraft and the checks creating it would on the day of posting be called to Reichwein's attention and Reichwein would thereupon call on United to supply in its commercial account the credits necessary to prevent such noon-day overdraft from becoming on that day an actual overdraft. These credits were supplied either by the deposit of Lofendo checks or by the plaintiff making new loans to United or the plaintiff discounting drafts for United. Many of such new loans were related in the manner already described to the Lofendo checks being delivered by United to plaintiff as remittances. The repeated appearance of these noon-day overdrafts in United's commercial account showed that United lacked adequate funds to maintain a good balance to its credit in its commercial account, and so Reichwein in making new loans to United contemporaneously with the receipt by plaintiff of remittances from United should have carefully scrutinized the new collateral and the financial posi-

tion of United. But he did not do so; and when he failed to do so he compounded his negligence.

30a. Both the four and the six checks were part of the kite. The facts stated in paragraphs 13 to and including 30 show that at least during the months of September and October plaintiff negligently permitted the kite to go on. If the kite had not gone on the four and the six checks would not have been drawn and the loss which shall have to be suffered because they were drawn and paid would not have occurred and so plaintiff's negligence in permitting the kite to go on proximately caused this loss.

#### IV.

#### Defendant Was Not Guilty of Negligence in Not Discovering the Kite

31. Lofendo opened his account with the branch on March 12th. At that time he met Frank Etribou, the manager of the branch, and made a deposit in cash. But all the deposits thereafter made in his account with the branch were made by mail, and he remained a stranger to the officers of the branch. Lofendo never borrowed any money from the branch and never applied to it for a loan. During the period from October 11th to October 18th, while I. N. Tarr, the operations officer of the branch, was away on his vacation, Joseph C. Cosgrove, its assistant manager, discovered that Lofendo was depositing to his credit checks drawn by United on plaintiff to the order of Lofendo and that he was drawing checks on his account payable to

United and that the branch was paying checks drawn on the account before checks deposited had a chance to clear; and he thought these circumstances required an explanation. When Tarr returned from his vacation on October 18th, Cosgrove told him what he had discovered about the account; and Tarr suggested that he should wire plaintiff asking a report with respect to United's financial responsibility. Tarr then wired plaintiff asking for such a report and in reply received Reichwein's wire of October 20th (Defendant's Exhibit O). This wire gave Tarr certain information with respect to United and suggested that Tarr contact the main branch of defendant at Fresno for additional information. Tarr thereupon telephoned to the Fresno Branch and asked Nelson, the man with whom he talked for information on [20] the credit responsibility of United. Nelson then read to Tarr over the telephone a letter, dated September 22nd, defendant's exhibit Q, which plaintiff had written the Fresno Branch. Both the wire and the letter stated in substance that United was a good customer of plaintiff and worthy of credit. But much of the information given by the wire and obtained from the Fresno Branch pursuant to the suggestion made by the wire was false.

32. The letter says that United was maintaining "balances averaging in satisfactory five figure proportions;" but, as stated, there were in United's account frequent noon-day overdrafts which would have been actual overdrafts on the days on which

such overdrafts appeared if they had not been met by additional loans or discounts; and in addition, as also stated, United had been drawing heavily on uncollected funds and on October 20th was continuing to do so despite plaintiff's direction to it to discontinue the practice. The letter says that United was making "proper use" of the loan being made to it; but it was not; at the very time when the wire of October 20th was sent, Lofendo checks in tremendous amounts were pouring into plaintiff as remittances on account of accounts receivable which certainly did not indicate a proper use of the commitment. The letter says that "the company is making progress from the standpoint of operation." But a company with frequent noon-day overdrafts, which is drawing heavily on uncollected [20a] funds and which is making remittances on account of pledged accounts receivable of one debtor in extremely large amounts, is not making progress from the standpoint of operation. And the letter says that plaintiff has "come to entertain a favorable regard for the account"; but in view of what had occurred respecting the account from the time Collins started his investigation to the date of Reichwein's wire plaintiff could not possibly have entertained such a regard for it.

33. Reichwein either knew that the information he was giving the branch by the wire was either false, or he made the representations made by the wire without reasonable grounds for believing them to be true.

34. The branch relied on the wire and the information which as suggested by the wire it received from Fresno Branch; and the wire and this information created in it a feeling of security with respect to the Lofendo account.

35. After Tarr had received the wire, Etribou did not terminate the Lofendo account, but he gave instructions that the branch should not accept for immediate credit checks of United being drawn to the order of Lofendo, which Lofendo might thereafter deposit in the branch until Lofendo could be contacted and his methods of operation discussed. At that time Tarr placed a "hold" on the Lofendo account, that is he arranged that the branch upon receiving checks for deposit in the Lofendo account should give Lofendo credit for them, but should not pay checks against such credits until the checks credited to the account had an opportunity to clear.

36. After Etribou had given these instructions, Tarr made an effort to contact Lofendo and as a result of this [21] effort towards the latter part of October, Lofendo and Rosenthal appeared at the branch and conferred with Cosgrove. Cosgrove told Lofendo and Rosenthal that his branch wanted Lofendo to give checks deposited to his account a chance to clear before he drew checks against them; that the branch wanted Lofendo to maintain a larger balance in the account; and that it wanted an explanation of the checks payable from Lofendo to United and from United to Lofendo. Rosenthal thereupon explained these checks to Cosgrove by

telling him that when United made a purchase for Lofendo's account, Lofendo would give it a check for the amount; that United would then sell the produce and give Lofendo a check for the proceeds. Cosgrove then told Rosenthal that he wanted a letter from United giving this explanation so that the branch would have a record in its files that the transactions between Lofendo and United giving rise to the checks on both sides were bona fide purchases and sales. Rosenthal replied that he would give the branch such a letter. Cosgrove then told Etribou and Tarr what had been stated in the conversation and that he was satisfied.

37. After the lapse of about ten days following Cosgrove's discussion with Rosenthal and Lofendo, Cosgrove and Tarr discussed the account. Tarr told Cosgrove that the account had not improved and Cosgrove informed Tarr that the letter for which he had asked Rosenthal had not been received. The account was then discussed at a meeting of the officers of the branch on November 10th; and at this meeting Etribou gave instructions that when Lofendo deposited checks he should not be given credit for them, but that the checks should be sent on for collection.

38. On November 12th the branch for the first time rejected checks aggregating \$57,694.97, drawn by Lofendo on the account because of lack of sufficient funds to pay them. On that day the branch wired the San Francisco head office of [22] defendant that it had rejected these checks, and on

November 13th (a Saturday), such head office wired plaintiff that these checks had been rejected. Plaintiff received this wire on November 15th. On November 16th the branch for the same reason and for the second time rejected additional checks aggregating \$110,265.04, drawn by Lofendo on the account; and on November 17th the plaintiff received another wire from defendant notifying it of the rejection of these additional checks. When on November 17th plaintiff received this second wire notifying it of the rejection of additional checks, it called in Rosenthal and had a discussion with him which led to the admission by Rosenthal that United had been borrowing from plaintiff on fictitious collateral.

39. On November 10th, the only thing that had occurred adverse to Lofendo which had come to the notice of the branch was that Lofendo had not supplied the branch with the letter which Cosgrove had requested. But this circumstance was not of such a serious import as to lead the branch to believe that Lofendo and United were engaged in a fraudulent kiting operation, particularly in view of Reichwein's wire to Tarr of October 20th, and the information which pursuant to Reichwein's suggestion Tarr had obtained from the Fresno Branch. It was not until after the branch began to reject the Lofendo checks drawn on the account that it began to suspect that check kiting might be going on.

40. Defendant was not negligent in not having discovered the kite.

## VI.

The Conversations of November 17th and 18th  
between the Officers of the Parties

41. On the afternoon of November 17th, Frederick C. Messenger, an officer of plaintiff, had a telephone conversation with Etribou. In this conversation Messenger told Etribou that United had perpetrated a fraud upon plaintiff and that one of its officers had admitted that it pledged fraudulent collateral to plaintiff; and that plaintiff had sent to the branch an advice of credit for the six checks. Messenger then asked Etribou if the branch had received this advice of credit. Etribou replied that the branch had not received the advice. Etribou also told Messenger that the branch had not been paying against uncollected funds and was in the clear and had a balance of \$699.02. Messenger then asked Etribou if the branch upon receiving the advice of credit would not enter the credit. Etribou replied that he would be happy to do anything he could to assist plaintiff, but that he would have to enter the credit when it was received and that if plaintiff would send out checks of Lofendo drawn on the account he would do what he could to give plaintiff preference in charging such checks against the credit. In this conversation no agreement was made between plaintiff and defendant under which defendant agreed that it would surrender its rights arising out of payment of the six checks by plaintiff.

42. LeRoy left Chicago by air during the night

of November 17th and arrived in San Francisco on the morning of November 18th and went to the head office of defendant in San Francisco where he had conversation with Roland T. Duncan, an officer of defendant, and Kenneth M. Johnson, a lawyer employed in the legal department of the defendant. This paragraph states what was said in the conversation. LeRoy told Duncan and Johnson that Merchandise was to take a large loss in its business transactions with United and that one of plaintiff's clerks had mailed the advice of credit for the six checks by mistake when it should not have been mailed; and that the advice of credit had been sent out in error because the six checks had been charged against fictitious credits and that for these reasons plaintiff had revoked the advice of credit. Duncan told LeRoy that he had learned upon communicating with Etribou that the branch had not been paying checks against uncollected funds and that Lofendo's account had a credit of \$699.02. (All those who took part in the conversations of November 17th and 18th believed that the branch had not been paying against uncollected funds and that Lofendo had a balance of good funds to his credit of \$699.02; and they conversed with one another on this basis; but the fact was that they were all mistaken because, as will be stated more in detail later, at the time of these conversations the branch had paid checks drawn by Lofendo against uncollected funds and Lofendo, instead of having a balance of good funds to his credit, was indebted to the branch.) Johnson told

LeRoy that he and Duncan wanted to assist plaintiff in any way they could, but that Johnson would not try to determine at that time the ultimate legal rights and duties of plaintiff and Lofendo arising out of the payment of the six checks. During the conversation between Duncan, Johnson and LeRoy, Johnson had a telephone conversation with Etribou in which Etribou repeated to Johnson that the branch had not been paying against uncollected funds and that there was a balance to Lofendo's credit of \$699.02; and in which Johnson told Etribou that on the basis of this information given him by LeRoy and Etribou the branch should ignore the advice of credit when the advice was received and that it should freeze the account and should not permit any transactions of any kind relating to it on the part of anybody. In the conversations between LeRoy on one hand and Johnson and Duncan on the other no agreement was made between plaintiff and defendant under which defendant agreed that it would surrender its rights arising out of the payment of the six checks by plaintiff.

43. But if the conversation between Messenger and Etribou or the conversations between Duncan, Johnson and LeRoy had created an agreement between plaintiff and defendant that defendant would surrender its rights arising out of the payment by plaintiff of the six checks, such agreements would have been invalid (a) because it lacked consideration; (b) because it was based upon the mutual

mistake of the parties that the branch had not been paying against uncollected funds and that there was in Lofendo's account a credit balance of good funds of \$699.02; and (c) because it was induced by the false representations of both Messenger and LeRoy that the advice of credit respecting the six checks had been mailed by one of plaintiff's clerks when it should not have been mailed and that the six checks had been charged against fictitious credits.

## VII.

### Plaintiff Was Not Induced by Mistake or Fraud to Pay the Six or Four Checks; Plaintiff's Mistake Was in Negligently Making Loans to United Secured by Fraudulent Collateral

44. The commercial ledger sheet of the United account with plaintiff marked defendant's Exhibit HH, shows that at the close of business on November 10th, there was a balance to the credit of United of \$7,673.09. November 11th was a holiday. On November 12th, the four checks, together with other checks, were debited to the account. On that day amounts aggregating \$167,710.43, were credited to the account. And at the close of business on November 12th, the balance to United's credit in its commercial account was \$77,617.55.

45. This commercial ledger sheet of United's account with plaintiff also shows that at the close of business on November 13th, which was a Saturday, there was a balance to the credit of United of \$241,525.04. On November 15th, which

was Monday, the six checks, together with other checks, were debited to the account. On that date amounts aggregating \$76,093.55 were credited to the account. And at the close of business on November 15th, the balance to the United's credit in its commercial account was \$176,650.65.

46. The balances referred to in paragraphs 44 and 45 to the credit of United in its commercial account were created mainly by the crediting to the account of the proceeds of new loans made by plaintiff to United in accordance with the practice already described, but a small part of these balances was created by the crediting thereto of the proceeds of drafts discounted by plaintiff for United.

47. After November 15th, Lofendo checks aggregating \$534,548.18, which United had delivered to plaintiff as remittances on account of assigned accounts receivable and which plaintiff upon their receipt had applied on accounts of United's indebtedness to it, were returned to plaintiff without having been paid, and plaintiff thereupon during the period from November 17th to November 28th, exercised its right of set off by charging such Lofendo checks against the amount to the credit of United in its commercial account.

48. But when plaintiff paid both the four checks and the six checks there was a credit balance to the account of United in its commercial account and therefore plaintiff did not charge the four checks and the six checks against fictitious credits and did

not make any mistake in the payment of these checks. The mistake which plaintiff made was in making loans to United secured by fictitious collateral. And the record shows that plaintiff's mistake in this respect as well as its failure to discover the kite was due to its gross negligence.

49. The delivering by United to plaintiff of the Lofendo checks referred to in paragraph 47 did not induce plaintiff to pay checks drawn by United on its commercial account. As stated, these Lofendo checks were delivered by United to plaintiff as remittances on account of accounts receivable and were applied by plaintiff on account of United's indebtedness to it. Pursuant to the practice followed by plaintiff in its transactions with United, plaintiff, contemporaneously with the receipt of these Lofendo checks, made new loans to United and took from United notes to evidence such new loans and the assignment of additional accounts receivable to secure the same. But the making of the new loans by plaintiff to United was not based upon the receipt of the remittances, but upon the new notes and the additional collateral. In this connection Messenger testified that the remittances were not the basis of the new loans; but that "they created by their acceptance and use as a payment an area in which additional loans could be granted," and that the new loans were granted on the basis of new collateral. When the Lofendo checks which were delivered to plaintiff as remittances were refused payment the result was that United's in-

debtiness to plaintiff was increased by the amount of the checks. But the acceptance by plaintiff of the Lofendo checks as remittances did not induce plaintiff to pay checks of United drawn on its commercial account. Plaintiff paid such checks because there was a balance in United's commercial account to its credit. As already stated, this balance was created to a large extent by loans made by United to plaintiff. Plaintiff claims that it was induced to make such loans by the pledging with it of fictitious collateral. The record is not particularly clear with respect to United's fraud in pledging fictitious collateral to plaintiff. But when United by fraud induced plaintiff to make it loans secured by fictitious collateral, it was not inducing plaintiff to pay checks drawn on its account. Plaintiff was not induced by such fraud to pay checks of United, but to loan it money.

## VIII.

If It Be Assumed Contrary to the Fact That Plaintiff Was Induced by Fraud or Mistake to Pay the Six and Four Checks, the Facts Show That It Cannot Recover Such Payments

50. At the close of business at the branch on November 10th, 1948, there was a balance to the credit of Lofendo of \$13,061.17 all in collected funds. On November 15th checks of Lofendo drawn on his account totalling \$75,586.86 were received at the branch in the in-clearings. \$51,862.36 of these checks were payable to United. The checks payable to United were Lofendo checks received as remit-

tances by plaintiff and applied by it on account of United's indebtedness to it. And so when the branch paid these checks for \$51,862.36 plaintiff got the benefit of the payment.

51. As at the time the checks for \$75,586.86 were received at the branch there was only a balance of \$13,061.17 to Lofendo's credit, there were insufficient funds in the account to pay them. When the \$75,586.86 were received on November 15th, the branch under section 16c of the California Bank Act had until the end of the next succeeding business day to reject them. But it did not reject them and so under the law it in effect paid them although it had not charged them against any credit in the account.

52. On September 15th the checks for \$97,207.00 were received at the branch in the mail and, pursuant to the practice of delayed posting, the branch on November 16th gave Lofendo immediate credit for this \$97,207.00 as of November 15th. Etribou testified that the giving of this credit to Lofendo was contrary to his instructions and a mistake. But defendant was bound by the act of its clerk in allowing Lofendo this credit. Under section 16c this credit was conditional until the checks were paid. And under section 16c defendant at any time after it allowed this conditional credit had the right to charge back the checks or collect them from Lofendo. In other words, Lofendo upon [29] defendant's allowing him credit for the \$97,207.00 became indebted to defendant in that amount which indebt-

edness would have terminated in the event the checks had been paid.

53. On November 16th there arrived in the branch in the in-clearings three checks for \$109,-569.15. These checks aggregating \$109,569.15 were likewise payable to United and were Lofendo checks received as remittances by plaintiff and applied by it on account of United's indebtedness to it. And so when the branch paid these checks plaintiff got the benefit of the payment.

54. As stated, the branch had until the close of business on November 16th within which to reject the checks for \$75,586.86; and as also stated, it did not reject them. And the branch had until the close of business on November 17th within which to reject the checks for \$109,564.15. And so on November 16th the branch had in its hands checks of Lofendo drawn on the account aggregating \$185,156.01 (the checks for \$75,586.86 plus the checks for \$109,-564.15); and at that time there was to the credit of Lofendo the \$13,061.17 of collected funds, plus the conditional credit of \$97,207.00.

55. The branch did not reject either the checks for \$75,586.86, nor the checks for \$109,569.15; but on November 16th it debited the checks for \$109,-569.15 against the amount of the credits then in the account, that is the \$110,268.17 (the \$13,061.17, plus the \$97,207.00). Pursuant to the practice of delayed posting of counterwork the credit of \$97,-207.00 was posted on November 16th as of November 15th; and pursuant to the practice of pre-posting

in-clearings the debit of the checks for \$109,569.15 was made on November 16th, the date of the receipt of these checks, as of November 15th. The result was that the ledger sheet of Lofendo's account shows that as of the close of business on November 15th the balance to the credit of Lofendo [30] was \$699.02. (The checks for \$109,589.15 were deducted from the credits aggregating \$110,268.17, leaving a balance of \$699.02. And so at the close of business on November 16th Lofendo had a credit balance of \$699.02 and he was indebted to the branch in the sum of \$172,094.84. The \$75,586.86, plus the \$97,-207.00, an aggregate of \$172,793.86, less the credit balance of \$699.02.)

56. It is true that in the normal operations of the branch the checks for \$75,586.86 which had been received in the in-clearings on November 15th would have been charged against the credit balance in the account prior to the charging of the checks for \$109,569.15 which were received in the in-clearings on the following day, November 16th. But it cannot make any difference which checks the branch charged against the account as of November 15th. This was a mere matter of bookkeeping. What controlled the rights of the branch with respect to Lofendo was not what it put in its books, but the facts. As stated, on November 16th, the branch had the checks for \$75,586.86 and the checks for \$100,569.15 in its hands. At that time it had the right under the law to reject all these checks, but it paid them all. It paid the \$109,569.15 by debiting these checks against the account and it in effect

paid the \$75,586.86 by not rejecting them. And as just pointed out, the result of these acts was that as of the close of business on November 16th, Lofendo was indebted to the branch for \$172,094.84.

57. On November 16th there arrived at the branch the advices of credit stating that the four checks for \$89,813.10 had been paid. This amount was credited to the account on November 17th. Pursuant to the practice of delayed posting this credit was actually posted on November 18th as of November 17th. When this credit was entered there was created on the books of the branch a credit balance in Lofendo's favor of \$90,512.12 (the \$89,813.10 plus the credit balance at the close [31] of business on November 15th of \$699.02). Concurrently with the entering on the books of the credit of \$89,813.10 the checks for \$75,586.86 were charged against the account. The result, as shown by the ledger card of the account, was that the credit balance in the account as of the close of business on November 17th was \$14,925.26. Although the account showed this credit balance as of the close of business on November 17th, the checks for \$97,207.00 had not been paid as of that day, and so Lofendo was in fact indebted to the branch in the difference between \$97,207.00 and the credit balance of \$14,925.26, or in the sum of \$82,281.74.

58. Defendant sent the checks for \$97,207.00 to Continental Illinois Bank and Trust Company of Chicago so that it could present them to plaintiff for payment. In the evening of November 18th,

the branch received a wire from the Continental Illinois Bank and Trust Company that plaintiff had rejected the checks for \$97,207.00; and so on that day it was established that defendant's right to collect this amount from Lofendo would not be terminated by the payment of the checks; and so on that day Lofendo's indebtedness to defendant for the \$82,281.74 mentioned in the next preceding paragraph became unconditional, that is it ceased to be subject to the condition that this indebtedness would be eliminated by the payment of the checks for \$97,209.00.

59. In November 19th, the advice of credit for the six checks for \$113,216.50 was received at the branch; and on that day the account was credited with this amount; and on the same day the account was debited with the \$97,207.00. Pursuant to the practice of delayed posting, these last entries were made on November 20th as of November 19th, and so the ledger card shows that at the close of business on November 19th, there was a balance to Lofendo's credit of \$30,934.76 (the credit balance as [32] of the close of business on November 17th of \$14,925.26, plus the \$113,216.50, less the \$97,207.00).

60. As already stated, Lofendo at the close of business on November 16th was indebted to defendant in the sum of \$172,094.84 and on November 17th this indebtedness was reduced to \$82,281.74. Defendant had a lien on the six checks and on the four checks and on their proceeds to secure this indebtedness of Lofendo to it, which lien con-

tinued in existence until on November 19th, the branch entered the credit for the six checks and charged the \$97,207.00 against it. When Lofendo became indebted to defendant at the close of business on November 16th, defendant's rights to its said lien then accrued; and on that date defendant had no notice whatever that plaintiff was claiming that it was induced to pay the six checks or the four checks by fraud or mistake. Defendant, therefore, by virtue of this lien became a holder for value of the six checks and the four checks.

61. Both the six checks and the four checks were paid as part of a course of business between plaintiff and defendant involving the United's account with plaintiff and the Lofendo account with defendant and so the right of plaintiff to recover the amount paid by it on account of the six checks and the four checks depends upon what occurred in this course of business.

62. The checks for \$109,564.15 were charged against a credit balance in the account which included the conditional credit of \$97,207.00, and the checks for \$75,586.86 were charged against a credit balance in the account which included the four checks for \$89,813.10. Plaintiff got the benefit of the payment by defendant of the checks for \$109,569.15 because these checks were remittances delivered by United to plaintiff and were applied on account of United's indebtedness to plaintiff. And plaintiff got the benefit of the payment by defendant of the [33] checks for \$75,536.86, because included

among these checks were checks for \$51,862.35 delivered by United to plaintiff as remittances and applied on account of United's indebtedness to plaintiff.

63. After plaintiff got the benefit of this payment by defendant of the checks for \$109,569.15, it refused to pay the checks for \$97,207.00, the crediting of which to Lofendo's account created for the most part the credit balance against which the checks for \$109,569.15 were charged. Upon plaintiff's rejection of the checks for \$97,207.00, these checks were charged against the balance in the account created by the crediting thereto of the six checks for \$113,206.50. If plaintiff is permitted to have the \$109,569.15 charged against the \$97,207.00 and at the same time to recover the \$113,216.50 against which the \$97,207.00 was charged it will be getting the benefit of the \$97,207.00 disbursed by defendant and at the same time will be denying defendant the benefit of its payment of the six checks.

64. The checks for \$75,586.86 were charged against a credit balance made up principally of the credit created by plaintiff's payment of the four checks for \$89,813.10. As stated, plaintiff got the benefit of the payment of \$51,862.36 of these checks for \$75,586.86. If plaintiff is permitted to do what it is now seeking to do, that is to recover this payment of \$89,813.10, it will in effect be paid twice; it will have received the benefit of the payment of the checks for \$51,862.36 charged against the credit

balance made up principally of \$89,813.10 and at the same time it will have recovered this latter amount. [34]

### Conclusions of Law

And now the court separately states its conclusions of law based upon the foregoing facts and directs the entry of the appropriate judgment as follows:

1. Plaintiff paid both the four checks and the six checks.
2. When the branch received the four checks and the six checks through the mail for deposit and elected to send them to defendant for collection instead of crediting the amount thereof to Lofendo's account, defendant became an agent of Lofendo for the presentation and collection of both sets of checks. When plaintiff paid the four checks and credited the defendant with the amount thereof, the agency of defendant to present and collect the four checks was thereupon terminated and plaintiff thereupon became indebted to defendant for the amount of the four checks and defendant thereupon became indebted to Lofendo for the amount thereof; and when plaintiff paid the six checks and credited defendant with the amount thereof, the agency of defendant to present and collect the six checks was thereupon terminated and plaintiff thereupon became indebted to defendant for the amount of the six checks and defendants thereupon became indebted to Lofendo for the amount thereof.

3. As plaintiff was not induced by either fraud or mistake to pay either the four or the six checks it has no grounds upon which it can recover such payments from defendant.

4. If contrary to the fact it be assumed that plaintiff was induced by fraud or mistake to pay the four and the six checks and that defendant held the proceeds of such collection as the agent of Lofendo, nevertheless plaintiff cannot recover such payments from defendant for these reasons:

(a) Defendant had a lien on the four and the six checks and their proceeds to secure Lofendo's indebtedness to it; and therefore defendant was a holder for value of the four and six checks and their proceeds and had the right to retain such payments; and

(b) As part of the course of business between plaintiff and defendant, plaintiff received a substantial benefit from the payment of the four and six checks and therefore is precluded in equity from recovering such payments.

5. If contrary to the fact it be assumed again that plaintiff was induced by fraud or mistake to pay the two groups of checks, it cannot recover such payment for this reason: As stated, upon plaintiff's paying each of the two groups of checks, it became indebted to defendant and defendant became indebted to Lofendo in the amount of such payment; and as also stated before defendant had any notice that plaintiff was induced by fraud or mistake to make such payments, Lofendo became

indebted to defendant and defendant became entitled to offset its indebtedness to Lofendo against Lofendo's indebtedness to it; and therefore defendant was in the position of a holder for value of the payments and plaintiff cannot recover them from defendant.

6. As plaintiff's negligence in failing to discover the kite proximately caused the loss which either plaintiff or defendant must suffer by reason of the payment of the four and six checks, plaintiff cannot in any event recover such payments from defendant.

And so the court hereby directs that judgment be entered in this action that plaintiff recover nothing from defendant and that defendant have judgment against plaintiff [36] for its costs of suit herein incurred.

Dated: .....

.....,  
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 24, 1950. [37]

[Title of District Court and Cause.]

STIPULATION THAT EXECUTION OF  
JUDGMENT SHALL BE STAYED

Whereas, judgment has been entered in said action in favor of plaintiff and against defendant; and

Whereas, defendant has appealed or is about to appeal from said judgment; and

Whereas, Rule 73(c) of the Federal Rules of Civil Procedure provides that when a party takes an appeal he shall file a bond for costs on appeal with his notice of appeal, and Rules 62(d) and 73(d) of said Rules provide that an appellant may stay the execution of a judgment pending an appeal by giving a supersedeas bond;

Now, Therefore, plaintiff hereby stipulates and agrees (1) that plaintiff hereby waives said bond for costs on said appeal and that defendant shall not be required to file such a bond; and (2) that pending said appeal execution on said judgment shall be stayed and no proceedings shall be taken for its enforcement in the same manner and with the same effect as though defendant had given a supersedeas bond as required by said Rules 62(d) and 73(d); provided that at any time plaintiff may give defendant ten days' notice in writing that this stipulation is terminated and the said stay shall thereupon cease unless within said ten days de-

fendant shall file a supersedeas bond as required by said rules.

/s/ MOSES LASKY,

BROBECK, PHLEGER &  
HARRISON,

/s/ THOMAS P. RIORDAN,

RIORDAN, LINKLATER &  
BUTLER,

Attorneys for Plaintiff.

/s/ S. B. STEWART, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE,

ERSKINE, ERSKINE &  
TULLEY,

Attorneys for Defendant.

So Ordered:

/s/ MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed June 14, 1951.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice Is Hereby Given that Eugene J. O'Riley as trustee in bankruptcy of the estate of United Produce Company, a corporation, bankrupt, inter-

pledaded defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that part of the final judgment of the above-entitled District Court, entered herein on the 8th day of June, 1951, dismissing the interpleader counterclaim of the above-named defendant Bank of America National Trust and Savings Association and the claim in response thereto of the said interpleaded defendant, Eugene J. O'Riley, together with the answer of said interpleaded defendant to the complaint and its reply to said interpleader counterclaim.

Dated July 6, 1951.

/s/ JOHN L. BRADLEY,  
CRIMMINS, KENT, DRAPER  
& BRADLEY,  
Attorneys for Interpleaded  
Defendant.

[Endorsed]: Filed July 7, 1951.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice Is Hereby Given that Bank of America National Trust and Savings Association, the defendant in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from all of the final judgment of the above-entitled District Court entered in said Dis-

trict Court on the 8th day of June, 1951, in favor of Merchandise National Bank of Chicago, the plaintiff in said action, and against said defendant.

Dated June 22nd, 1951.

/s/ S. B. STEWART, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE,

ERSKINE, ERSKINE &  
TULLEY,

By /s/ MORSE ERSKINE,

Attorneys for Defendant.

[Endorsed]: Filed June 22, 1951.

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[Title of District Court and Cause.]

DESIGNATION OF RECORD  
ON APPEAL

Bank of America National Trust and Savings Association, the defendant in the above-entitled action, has appealed to the United States Court of Appeals for the Ninth Circuit from all of the final judgment of the above-entitled District Court entered in said District Court on the 8th day of June, 1951, in favor of Merchandise National Bank, the plaintiff in the above-entitled action, and against said defendant. Pursuant to Rule 75 of the Federal Rules of Civil Procedure, said defendant hereby designates for inclusion in the record on said appeal the complete record and all the proceedings and evidence in said action and hereby requests the

Clerk of said District Court to transmit to said Court of Appeals said complete record and said proceedings and evidence. The reporter's transcript of the evidence in said action is already on file in said District Court.

Dated June 22nd, 1951.

/s/ S. B. STEWARD, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE,

ERSKINE, ERSKINE &  
TULLEY,

By /s/ MORSE ERSKINE,  
Attorneys for Defendant.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 22, 1950.

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[Title of District Court and Cause.]

#### STIPULATION ON APPEAL

Whereas, Eugene J. O'Riley, interpleaded defendant above named, has filed his Notice of Appeal from a part of the judgment entered herein on June 8, 1951,

Now, Therefore, it is hereby stipulated by and among the parties hereto as follows:

(a) As to Bond. That said interpleaded defendant may be exempted from filing any bond for costs and/or supersedeas bond on such appeal.

(b) As to Record. That said interpleaded defendant shall and does hereby agree to a single record on appeal, the contents of which shall be whatever matter is designated or agreed upon by and between plaintiff and defendant Bank of America National Trust and Savings Association.

/s/ MOSES LASKY,  
BROBECK, PHLEGER &  
HARRISON,  
Attorneys for Plaintiff.

/s/ S. B. STEWART, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE

ERSKINE, ERSKINE &  
TULLEY,

By /s/ MORSE ERSKINE,  
Attorneys for Defendant Bank of America National  
Trust and Savings Association.

/s/ JOHN L. BRADLEY,  
CRIMMINS, KENT, DRAPER  
& BRADLEY,

Attorneys for Interpleaded Defendant Eugene J.  
O'Riley.

Approved:

/s/ EDWARD P. MURPHY,  
United States District Judge.

[Endorsed]: Filed July 9, 1951.

In the Southern Division of the United States  
District Court for the Northern District of  
California

Before: Hon. William D. Murray, Judge.

**MERCHANDISE NATIONAL BANK OF CHI-  
CAGO, etc.,**

Plaintiff,

vs.

**BANK OF AMERICA NATIONAL SAVINGS  
AND LOAN ASSOCIATION,**

Defendant.

No. 28721-R

**REPORTER'S TRANSCRIPT**

Thursday, June 15, 1950

**Appearances:**

For the Plaintiff:

BROBECK, PHLEGER &  
HARRISON, by  
MOSES LASKY, ESQ.

RIORDAN, LINKLATER &  
BUTLER, by  
THOMAS P. RIORDAN, ESQ.

For the Defendant:

ERSKINE, PILLSBURY & TULLEY, by  
MORSE ERSKINE, ESQ.

For Interpleaded Defendant: Trustee in Bank-  
ruptcy of the United Produce Corporation:

JOHN L. BRADLEY, ESQ.

The Clerk: Merchandise National Bank v. Bank of America on trial.

Mr. Lasky: Ready.

Mr. Erskine: Ready. [2\*]

\* \* \*

Mr. Lasky: I might state, in view of what counsel has [58] said as to the United Produce situation, I think that we ought to be able to stipulate that the so-called Losendo account in the East Bakersfield branch of the Bank of America was an account in which Losendo actually had no interest; it was just another account maintained by United for its own purposes.

The Court: As a result of this kiting operation?

Mr. Lasky: If we could so stipulate, it would eliminate from my proof two long depositions to establish that fact.

Mr. Erskine: I think we can do that. I would suggest to Mr. Lasky that he prepare a written stipulation and let me look at it. I always like to have a stipulation in writing so that I can read and understand what it is when I agree to it.

Mr. Lasky: I will do that over the week end, because we won't have reached that point in our proof, anyway, before then. [59]

\* \* \*

Mr. Erskine: I suggest that that matter lie in abeyance and the Court may possibly rule upon it later.

One further thing and that is this: when the

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

pre-trial conference took place before Judge Goodman, I told Judge Goodman I proposed to file an amended answer and that I would serve a copy of my proposed amendment upon counsel on the other as quickly as I could, which I did, and I would like to file that amended answer at this time. Is there any objection to that?

Mr. Lasky: Yes, I object to the filing of an amended answer. [72]

\* \* \*

The Court: Leave to file the amended answer is granted.

Mr. Lasky: The amended answer is also an amended counter claim, and that puts the burden on me to draw a reply to take the place of the reply of the original counter claims.

Mr. Erskine: I told you when I sent it to you that I would be willing to stipulate, if you wanted me to, that your reply to my original counter claims could be considered a reply to the counter claim stated in the amended answer.

Mr. Lasky: There is some new material in your counter claim. For example, the counter claim for the first time [73] mentions the point counsel mentioned a while ago, that we represented to them the account was good. It could be deemed we deny any such representation or reliance thereon——

Mr. Erskine: I will stipulate that is so.

Mr. Lasky: Then we do not have to file any new pleadings in response.

The Court: Very well. The pleading may stand as a reply to the amendment. [74]

\* \* \*

With that I will terminate these preliminary remarks but merely observe, as counsel has said, Merchandise National Bank was putting its head in the sand, and I would suggest a much more appropriate statement would be the Bank of America put its hand in the pocket of Merchandise. With that I would like to call as my first witness Mr. Tobey.

**LLOYD J. TOBEY**

called as a witness on behalf of the plaintiff, under Rule 43 (b), Rules of Civil Procedure, sworn.

The Clerk: State your name to the Court, please?

A. Llody J. Tobey.

Mr. Lasky: I called Mr. Tobey under Rule 43(b) as an adverse witness.

#### Direct Examination

By Mr. Lasky:

Q. Mr. Tobey, you are a vice-president of the Bank of America, are you not?

A. An assistant vice-president.

Q. And you have been such for some eight years or nine years? A. That is correct.

Q. And you are in the cashier's department?

A. That is correct.

Q. And have been since March of 1949?

A. That is correct.

(Testimony of Lloyd J. Tobey.)

Q. Prior to that you were in the defendant Bank of America's [78] controller's department, is that right? A. That is correct.

Q. You were in the controller's department in the month of November, 1948?

A. That is correct.

Q. And your duties as such were to handle operating errors, differences arising from check operations, where branches had made errors that might result in losses? Those things came to your attention for review, is that right?

A. That is correct.

Q. You made investigations of such transactions?

A. Yes, sir.

Q. Might it fairly be said that you were in the nature of a trouble shooter for the Bank of America at that time? A. That is correct.

Q. It is a fact is it not that in the year 1948 Merchandise National Bank, the plaintiff in this case, had considerable sums of money on deposit with your bank at the head office? A. Yes, sir.

Mr. Lasky: Will you produce for me, counsel, the original ledger sheets which are the Duncan Exhibit 1 on the exhibits?

Mr. Erskine: Will you leave the stand, Mr. Tobey, and get it? He knows where it is.

The Court: Can't you stipulate on that?

Mr. Lasky: Yes, I think we will stipulate that is it, [79] but we want to offer it in evidence. I suggest you get out all those exhibits and lay them on the table so we can get them in a hurry. I

(Testimony of Lloyd J. Tobey.)

believe the Court will find we will have no difficulties in the authentication of copies?

The Witness: You wish just the exhibits of the Bank of America?

Mr. Lasky: That is right, the ones that were taken on the San Francisco depositions.

The Court: The amount on deposit.

Mr. Lasky: Yes.

The Court: Can't you stipulate what the amount is and keep the records out of evidence?

Mr. Lasky: The amount kept varying from day to day here.

The Court: On what day is it important here? Stipulate as to the dates and then we won't have to be bothered with the records. Whatever dates are important to you, the records show, and you can stipulate on that, don't you think? There is no use cluttering the record.

Mr. Lasky: There is a certain entry I want to point to and I think this might be helpful to have it. We do not need this. Will it be stipulated what I have here is a true transcript of the ledger of the Merchandise National Bank's account as you kept it on the books of the Bank of America?

Mr. Erskine: That is true?

The Witness: Yes. [80]

Mr. Erskine: I will stipulate.

The Court: You wish it to be received in evidence?

Mr. Lasky: Yes, your Honor.

(Testimony of Lloyd J. Tobey.)

The Court: Have it marked, and it is admitted upon stipulation.

(Whereupon the ledger sheets referred to were received in evidence and marked plaintiff's Exhibit 1.)

Q. (By Mr. Lasky): Perhaps you can find it more quickly than I can, Mr. Tobey, the \$113,000 charge. I thought it was on page 6. Have you got it there?

A. That is a photostat of it. I have got to get the date of it. Right here (indicating).

Q. On one of the pages, under the date November 19th, appears a debit of \$113,216.50.

If your Honor please, that is the charge which is the controversy in this case, over the right of the Bank of America to make that.

Q. Now, Mr. Tobey, it is a fact, is it not, that you personally were the man who caused that charge to be made? A. That is correct.

Q. You did so on the evening of November 19th?

A. That is correct.

Q. Along about 5 o'clock in the afternoon?

A. That is correct.

Q. And at that time you personally prepared a certain debit [81] slip, did you not?

A. That is correct.

Q. Have you the original? I have merely the photostat, and the photostat does not show plainly something I want to bring out.

Mr. Erskine: We are perfectly willing to have you use photostat when it is convenient for you.

(Testimony of Lloyd J. Tobey.)

Mr. Lasky: Oh, yes. In most cases we will do so. The photostat does not happen to be clear in this case.

Q. On that day late in the afternoon of November 19, upon your own responsibility, Mr. Tobey, you prepared this debit slip, did you not?

The Court: You had better have it marked first for identification.

Mr. Lasky: Very well. Will you mark this Plaintiff's Exhibit for identification?

(The document referred to was thereupon marked Plaintiff's Exhibit 2 for identification.)

Q. (By Mr. Lasky): Then I will repeat that question: It is a fact that on November 19th, late in the afternoon, on your own responsibility you prepared this debit slip, caused it to be prepared, and that is your signature upon it?

A. That is correct.

Q. This is the basis upon which the \$113,000 entry in the ledger account was entered? [82]

A. That is correct.

Q. And this reads, "General ledger debit, Accounting Department, San Francisco Headquarters, November 19, 1948, \$113,216.50. Contra: Suspense liabilities administration. Total collection letter of East Bakersfield branch No. 419 to Merchandise National Bank of Chicago for which they have credit advice and are sending their credit. This debit requested by Mr. Etribou from telephone call to Mr. George Schilling, Legal Department."

(Testimony of Lloyd J. Tobey.)

Now, I call your attention to the fact that something has been x'ed out on the typewriter. Is it not a fact that what has been x'ed out after the word "To Mr. George Schilling" are the words "to protect his debit"? A. That is correct.

Q. You caused this charge to be made in the Merchandise National Bank account to protect Etribou's credit to the account of Losendo?

A. No, sir, to protect his debit against the account of the Merchandise National Bank, which he had made that day, and was sending up through the usual channels.

Q. You did not receive any such debit from Mr. Etribou for several days, however, did you?

A. That is correct, I did not receive it. It came in the regular course of business by mail.

Q. Several days later?

A. On Monday the 22nd, to be exact. [83]

Q. But before that had happened you had already caused this charge to be made upon the books?

A. As indicated, at his request.

Q. And how was the request made?

A. Through Mr. Schilling.

Q. Through Mr. Schilling?

A. That is right.

Q. That is what Mr. Schilling told you?

A. That is correct.

Q. You did not get it from Mr. Etribou himself?

A. You read on the debit just how I made it and

(Testimony of Lloyd J. Tobey.)

how it was made, so I can't change what I said there and what is the fact.

Q. Late in the afternoon of the 19th, Mr. George Schilling of the Legal Department told you that he had had a telephone conversation with Etribou, and following that conversation you made this charge, is that right?

A. That is not correct, either. [84]

Q. What is the fact?

A. There was a telephone call in the afternoon and—when we were in Mr. Schilling's office, and during that conversation Mr. Etribou told him that he was making the debit and asked us to make the debit against the account of the Merchandise Bank.

Q. Are you relating now what was said to you by Mr. Schilling? A. I am.

Q. You didn't hear this telephone conversation yourself? A. No, sir.

Mr. Lasky: Then I move that the recital of the phone conversation go out as hearsay.

The Court: It may be stricken.

Q. (By Mr. Lasky): At the time Mr. Etribou was manager of the East Bakersfield branch, is that correct? A. That is correct.

Q. You are acquainted with the banking practices of the Bank of America, are you not, particularly with the practice concerning charges or debits to the accounts of correspondent banks and the practice particularly with reference to the account of Merchandise National Bank with respect to making debit entries against it had always been up to

(Testimony of Lloyd J. Tobey.)

that date that such debits as would be made would be predicated only on some kind of written paper from Merchandise Bank constituting an authorization to make the entry, is that correct? [85]

A. I don't think that that is correct in every respect.

Q. Well, in what respect—

A. I think that question of yours is a little broad, because there are different entries made, all different debit entries made.

Q. All right; I will confine it. With respect to charges against the account of Merchandise Bank resulting from alleged collections sent on to Merchandise Bank it had always been the uniform practice, had it not, that no charge would be made against the account of the Merchandise Bank unless, No. 1, a written paper of some kind constituting an authorization to make the entry, had been received from Merchandise Bank; that is true, No. 1, is it not?

A. That is true.

Q. And No. 2, it had always been the practice that the authority to the head office to make the charge against the account first came from the branch where the collection had originated?

A. That is correct.

Q. So in the case of any collection by the Merchandise Bank prior to this particular debit, the entry of debits of collections were made in the head office accounting department only on the basis of a written debit slip coming up from the branch where the collection originated?

(Testimony of Lloyd J. Tobey.)

A. That is correct.

Q. That practice was not followed here, is that right? [86]

A. That is true to the—except to the extent that I am explaining that it was being made on the request of the branch officer.

Q. The fact is that in this case this was an unusual entry with respect to the account of Merchandise National Bank? A. That is true.

Mr. Lasky: That is all. No further questions of Mr. Tobey.

#### Cross-Examination

By Mr. Erskine:

Q. Just a second, Mr. Tobey. Will you take the stand?

You stated in answer to a question put to you by counsel that a charge was not made against the Merchandise account unless the Bank of America had same paper from the Merchandise Bank supporting the charge. You said "Yes" to that question, did you not?

A. It was confined to a collection.

Q. Yes?

A. It was in that case, but there was an advice of payment.

Q. Would you get me the advice of credit relating to the six checks, the original advice of credit, from among the exhibits?

Mr. Erskine: Will you mark this?

(Testimony of Lloyd J. Tobey.)

Mr. Lasky: Pardon me. Apparently I forgot to offer plaintiff's exhibit 2 for identification in evidence. I make that offer.

The Court: Is there any objection? [87]

Mr. Erskine: No.

The Court: It is so admitted.

The Clerk: Plaintiff's Exhibit 2 in evidence.

This is defendant's A for identification (referring to paper offered by Mr. Erskine.)

Mr. Erskine: Mr. Lasky, will it be stipulated that defendant's exhibit A for identification is the advice of credit sent out by the Merchandise Bank relating to the six checks on November 15?

Mr. Lasky: Oh, yes; I have no question about that.

Q. (By Mr. Erskine): Calling your attention to defendant's exhibit A for identification, Mr. Tobey, I will ask you whether or not when the Bank of America made that charge against the Merchandise account on November 19, the Bank of America had in its hands the advice of credit, defendant's exhibit A for identification, which I am now showing you.

Mr. Lasky: I object to that on the ground that it calls for a statement by this witness that he is not yet shown to know anything about, or that he knew anything about that at the time he caused the entry to be made in the account.

Mr. Erskine: Well, I will just—

The Court: This is just in the nature of a preliminary question, is it?

(Testimony of Lloyd J. Tobey.)

Mr. Erskine: I will show what he knew about it, your Honor.

The Court: What he knew about it, yes. [88]

Mr. Erskine: At the time he directed the entry to be made.

The Court: Then it will go to its weight, what he knew about the matter. Your objection is now overruled.

A. Are you asking me a question?

Mr. Erskine: Would you read the question, to save repetition, Mr. Reporter?

(Question read by the reporter.)

A. This advice of credit was in the hands of the East Bakersfield branch on the morning of November 19th, and Mr. Etribou, according to my understanding, told Mr. Schilling that he had it and that he was making a debit in accordance with it, and that he wanted us to make a similar debit ourselves.

Mr. Lasky: I wish to strike out all that because it is shown the whole thing is hearsay, everything he has testified to.

Mr. Erskine: If the Court please, counsel permitted him on direct examination to testify with respect to hearsay, and when I want to clear up a situation and show exactly what the instructions to this witness were and what his information was when he directed the charge to be made, the objection is made that it is hearsay. Hearsay works in his favor, but it apparently can't explain—

(Testimony of Lloyd J. Tobey.)

Mr. Lasky: I didn't ask the witness for hearsay, and when he gave it nonresponsively, I moved to strike it out.

The Court: It is hearsay. The motion to strike is granted. [89]

Q. (By Mr. Erskine): Let me put the question to you this way, then, Mr. Tobey: Do you know or were you informed at the time you directed the entry, the charge, to be made against the account of the Merchandise National Bank upon the basis of the debit ticket, plaintiff's exhibit 2—did you know or were you informed at that time that there was in the hands of the Bank of America defendant's exhibit A for identification, which I am now showing you. The answer to that can be yes or no.

Mr. Lasky: If the Court please, any conversations or information passed between the offices of the Bank of America internally where no representative of the defendant was present would be immaterial and not binding upon this, and I object to it upon that ground.

Mr. Erskine: If the Court please, counsel asked the witness whether or not a charge was ever made against the account of Merchandise National Bank with the Bank of America which was not supported by some paper that was issued by the Merchandise National Bank. That was one of the questions that counsel put to the witness. The witness answered the question yes, that no charge was made against the account of Merchandise National Bank in a collection of this sort unless the Bank of America

(Testimony of Lloyd J. Tobey.)

had in its hands some paper to support the charge. The witness directed the charge to be made. Counsel wants to show that the witness made the charge without anything supporting it, [90] without any information or knowledge as a basis for the debit entry which he has offered in evidence. I want to show now, in explanation of the situation, what the witness knew about the facts, whether the witness knew that there was in the hands of Bank of America at the time the debit entry plaintiff's exhibit 2 was prepared by him, a paper from the Merchandise Bank supporting the charge. I think I have a right to do that. Counsel talks about an unusual entry, calling for the conclusion of the witness whether or not the entry was unusual. I want to explain the circumstances under which the entry was made. I want to show the knowledge and information that were in the possession of this witness at the time he prepared the debit ticket, plaintiff's exhibit 2.

Mr. Lasky: If the Court please, to save time, I will stipulate that the advice of credit which has been marked—has it been given a number?

Mr. Erskine: Defendant's A for identification.

Mr. Lasky: —was in fact received at East Bakersfield on the morning of the 19th. There is a stamp on it which shows it was received about nine o'clock in the morning. That is a fact that we are going to bring out ourselves very shortly. But what I object to are internal conversations that

(Testimony of Lloyd J. Tobey.)

went on between officers of the Bank of America on the subject.

The Court: It would seem to me that when you are dealing with complicated book entries which proceed from one department [91] to another and from one branch to another, that you are necessarily in the course of business required to rely upon the statements and the information obtained by one department in order for the other department to operate. Isn't that the situation?

Mr. Erskine: That's right. That is exactly it.

The Court: In other words, you want to limit the proof just to what this man as an individual knows. It is the bank that is operating. It is the bank that is here involved, and it is the combination of all its employees.

Mr. Lasky: Quite true, but I proved through this witness that what happened here was an unusual charge, out of the ordinary course of events.

The Court: Well, he can explain the unusual charge. He can explain how it came to be. Objection is overruled.

The Witness: May I explain the unusual thing?

Mr. Lasky: Wait a minute now. The last question that was put to you, the reporter will read it to you.

(Question was read by the reporter.)

A. Yes.

Mr. Erskine: I would like to offer in evidence, if your Honor please, defendant's exhibit A.

(Testimony of Lloyd J. Tobey.)

The Court: Is there an objection?

Mr. Lasky: No objection.

The Court: It is so admitted. [92]

The Clerk: Defendant's Exhibit A in evidence.

Mr. Erskine: This is an important document in the case. I would like to submit this to the Court for its examination. I would like to have the witness explain to the Court the purport of such a document, Defendant's Exhibit A, in the course of the banking business.

Q. What was that, Mr. Tobey?

A. In the course of the banking business, when a bank forwards a check or draft or other instrument for collection, they initiate an instrument similar to this, representing an outgoing collection form, and forwarded it to the collecting banks. When—

Q. The paying bank or the collecting bank?

A. The paying bank, and when—and on that collection form they state how they want to know about whether it has been paid or not; they may ask that its fate be wired, or that payment be notified by mail, and they would also instruct the branch as to what to do with the proceeds, such as credit their account, or remit to them by draft or cashier's check, or send the money to other banks for credit in their account, and then when that notification of payment is received in the form of an advice, by telegraph if they requested wire fate, or by a notice such as that if they ask for mail fate, they thereupon debited the bank that sent them

(Testimony of Lloyd J. Tobey.)

this notice of payment and they credited the money to their customer or they paid [93] the money to their customer in cash or disposed of it in any way that they were instructed to do by the person who gave them the instrument which has been sent for collection.

Q. (By Mr. Erskine): I think, Mr. Tobey, counsel asked you with respect to the words deleted on this Plaintiff's Exhibit 1, the words that are exed out in typewriting, and you said that those were "to protect his debit." Now would you explain what those words meant, "to protect his debit"? Whose debit?

A. That was Mr.— that was the East Bakersfield branch's debit.

Q. Mr. Etribou's debit?

A. Mr. Etribou's debit.

Q. As manager of the East Bakersfield branch?

A. As manager of the East Bakersfield branch.

It was to protect his debit.

Q. What do you mean by that?

A. A debit which he made up on a regular form that he would ordinarily charge the bank that had credited his account for the collection, and he said that—as I previously stated, that he was making that debit, it being sent through in the regular course.

Q. That is, he told you he was making it?

A. He told Mr. Schilling that.

Q. A debit of the East Bakersfield branch which he was sending, as I understand it, to the office of

(Testimony of Lloyd J. Tobey.)

the Bank of America in [94] San Francisco, which was an instrument to debit the account of the Merchandise Bank with the six checks, is that right?

A. That is correct.

Mr. Lasky: Just a moment, please. Suppose the witness says that Mr. Etribou told Mr. Schilling that, I object to it on the ground that it is hearsay. If these internal communications may be proved, they should be proved by the people who participated in them, not by someone who was told about them.

Mr. Erskine: Counsel asked him about the words stricken out on this document, Plaintiff's Exhibit 1, and I was just getting him to explain what he meant by these deleted words.

Mr. Lasky: I didn't object to that, but then he went on to give a conversation that went on between Etribou and Schilling.

The Court: Yes; as I understood it, you went into a different conversation that doesn't explain that in any fashion. I will sustain the objection.

Q. (By Mr. Erskine): Let me put it to you this way then, Mr. Tobey: When you put on this Plaintiff's Exhibit No. 1 the words, "to protect his debit," which words were then stricken out, what did you mean by those words?

A. I had in mind that a debit was coming through, and that we should protect it so that when it was received there would be funds there to cover it.

(Testimony of Lloyd J. Tobey.)

Q. When you said a debit was coming through, what did you mean [95] by that?

A. The practice is that when they make a debit at a branch for collection, they send it through on a cash letter to the other branch, and it represents a debit to the account and then it is offset against the account of the person—of the bank or customer named.

Q. In other words, the debit ticket made out at the branch in this instance was what sort of a debit ticket?

Mr. Lasky: Pardon me; the debit ticket will speak for itself; you have it here. The witness has testified that he did not have it and did not get it for several days after he made his entry.

Mr. Erskine: I am still trying to get him to explain its use.

The Court: That is true. If the debit ticket is here, put the debit ticket in evidence.

Mr. Erskine: Yes. Have you got that debit ticket?

The Court: On which the entry was made.

Mr. Erskine: Get that debit ticket, Mr. Tobey.

Mr. Lasky: Of course the testimony is that it was made on this debit ticket before the other one ever arrived, several days before it arrived.

Mr. Erskine: Would you mark that, please?

The Clerk: Defendant's B for identification.

(Whereupon debit ticket was marked defendant's B for identification.) [96]

(Testimony of Lloyd J. Tobey.)

Mr. Erskine: Showing you this Defendant's Exhibit B for identification, Mr. Tobey, I will ask you what that is.

A. This is one of our standard debit forms for use by our branches in charging banks to which it has sent collections upon—this says, "Collection Debit" at the top, and then down below it says, "Debit Merchandise National Bank."

Q. With respect to this particular debit, just explain from what branch of the bank that came, to what branch of the bank it was directed, and what directions it gave the branch to which it was directed.

Mr. Lasky: Can't I stipulate with you about that?

Mr. Erskine: Yes, go ahead.

Mr. Lasky: I will stipulate that this document that was marked Etribou 12, is it?

Mr. Erskine: I am not sure.

Mr. Lasky: I want to be sure I am talking about the same instrument.

The Witness: That is correct.

Mr. Lasky: I will stipulate that this is a document which was mailed out from the East Bakersfield branch of the Bank of America late on the 19th or on the 20th, but which arrived in San Francisco at the head office on the 22nd; and as for what it is, it speaks for itself.

Mr. Erskine: That is not exactly clear upon the face of it. I don't know exactly when it was mailed from the East Bakersfield branch, and therefore I

(Testimony of Lloyd J. Tobey.)

can't accept your stipulation. [97] It is dated November 19, 1948.

Mr. Lasky: It has got a perforation through it which shows arrival in San Francisco on November 22.

Mr. Erskine: The 19th—

Mr. Lasky: So testified by Mr. Tobey.

Mr. Erskine: The 19th was Friday, the 20th was Saturday, the 21st was Sunday, and the 22nd was Monday, as I remember it.

The Court: Have you agreed upon that stipulation?

Mr. Erskine: I can't agree with it, your Honor, because I don't know when it was mailed.

The Court: Are you going to put any proof in as to when it was mailed?

Mr. Erskine: I think that will come out later.

The Court: Very well.

Q. (By Mr. Erskine): Just explain what that is, Mr. Tobey, will you? What is the use of that?

A. I think I have already explained that this is a standard debit form from the different branches in debiting banks for collection proceeds.

Q. What special use was that used for?

A. In this particular case when this debit was received in San Francisco, it was not debited to the account of Merchandise National Bank, but it was debited to the account of suspense liabilities.

Q. Well, the direction was a direction from the branch to the [98] central office of the Bank of America to debit the account of the Merchandise

(Testimony of Lloyd J. Tobey.)

Bank with \$113,000 odd dollars on account of the six checks that are the subject of this litigation; that is correct, isn't it? A. That is correct.

Mr. Lasky: I move that that go out. It calls for his conclusion. The document speaks for itself as to what it is.

Mr. Erskine: All right. I ask that this be admitted in evidence, if the Court please, as Defendant's Exhibit B.

The Court: Is there objection?

Mr. Lasky: I have no objection.

The Court: Very well. It may be so admitted.

The Clerk: Defendant's B in evidence.

Q. (By Mr. Erskine): Now, Mr. Tobey, on your direct examination you were asked whether or not the debit ticket that has been marked here Plaintiff's Exhibit 1 was a direction of an unusual entry, and your answer was yes. Will you please explain in what respects the entry was unusual?

A. It was unusual in that we had a telephone request to put it through, and that we put it through and credited it to suspense liabilities in anticipation of the debit which would be received from the East Bakersfield branch. It is unusual in that you don't have items of that kind every day. These debits that we just looked at—this last one—come through in the regular course and are debited to the correspondents or the [99] bank's account. However, we do have occasions when we are called upon by telephone or by wire to take certain actions in anticipation of other actions, and we have to take the

(Testimony of Lloyd J. Tobey.)

money and put it in some place, in some account, to meet the incoming item.

Mr. Lasky: I move to strike out that answer beginning with "There are cases that you have to do thus and so" as being the witness' argument on the subject. He has explained that this was unusual in this case for certain reasons. He has already given those reasons. He is giving his argument.

Mr. Erskine: It relates to the question whether it is unusual.

The Court: Overruled.

Q. (By Mr. Erskine): The entry made upon the basis of this Plaintiff's Exhibit No. 1 was to charge to suspense liabilities was it? A. Yes.

Q. Was that charge to suspense liabilities reversed thereafter?

A. No, this was—the original entry when we debited the Merchandise National Bank was offset by a credit to suspense liabilities. The funds were held there until this debit came in from the East Bakersfield branch, and by being debited to suspense liabilities, it offset the credit, and the account was cleared.

Mr. Erskine: No further questions. [100]

#### Redirect Examination

Mr. Lasky: Just a moment. Just one or two questions.

This episode where you, on your own responsibility, caused the charge to be made to the account of Merchandise National Bank for 113,000 is the

(Testimony of Lloyd J. Tobey.)

first time a charge was ever entered to the account of Merchandise National Bank on a collection item at the head office without having from the branch some kind of written instructions, is that right?

Mr. Erskine: Just a second. I object to the form of that question. It includes the words "on his own responsibility."

Mr. Lasky: He has testified to that.

Mr. Erskine: Well, that was included in the previous question that you put, and I didn't object to it because I didn't want to be captious; but the fact is this: that the testimony of the witness shows that Mr. Etribou telephoned to Mr. Schilling; that Mr. Schilling, before he gave this witness instructions—

The Court: Counsel, there is no use of you testifying at this point. Counsel is entitled to ask the question if he did it on his own responsibility.

Mr. Erskine: Yes.

The Court: It is up to the witness to answer. The witness can answer the question as to whether it was on his own responsibility or otherwise.

Mr. Lasky: He has already so testified.

The Court: Well, he can answer the question. It can be [101] further developed if it is necessary. Proceed. Read the question to the witness.

(Question read by the reporter.)

A. I couldn't testify to that; I don't know.

Q. (By Mr. Lasky): The first time you ever caused such a charge to be made, I assume?

(Testimony of Lloyd J. Tobey.)

A. The first time that I caused the charge—

Q. Yes.

A. But your question wasn't that, as I recall it. It was the first time, at any time such a charge, and I couldn't testify to that.

Q. You do testify, do you not, that it was the standard practice in the case of correspondent banks that no charge in case of a collection should be made against the correspondent's account at the head office until some debit item came up from the branch where the collection originated? That was the standard practice, was it not?

A. That was the standard practice.

Q. And it was standard practice that the branch would not send out any such instructions to the head office until it in turn had received some written paper from the correspondent bank authorizing it to do so; that is true, too, is it not?

A. That is true.

Q. And this is the first time, to your knowledge, where a charge was made against the account of Merchandise National Bank on a [102] collection item without waiting for something in writing to come up from the branch? I am only talking about your own knowledge, of course.

A. My own knowledge, right; but I don't want—may I explain, your Honor, that I don't want to leave the impression that such event could not happen, because we are a large organization and there are lots of transactions; it may be to leave that im-

(Testimony of Lloyd J. Tobey.)

pression would be wrong. And may I also, your Honor, explain that responsibility apparently raised the question, and I would like to enlarge my statement, that I carried out Mr. Etribou's instructions which had been conveyed to me on my own responsibility.

Q. Just a moment, Mr. Tobey. You remember your deposition was taken? A. I do.

Q. Do you not remember testifying—and I call your attention, counsel, to page 19 of his deposition—that you talked to Mr. Schilling, and that you then made the entry "on my responsibility"; is that correct? "I made the entry on my responsibility." I read from your deposition, page 19, line 9.

A. That is correct.

Q. Now, Mr. Tobey—

The Witness: I think that can be enlarged—

Mr. Erskine: Would you mind reading, counsel, as long as you refer to the deposition, would you mind reading all the way [103] down from 5 down through 10?

Mr. Lasky: Yes, I don't mind reading that. "I did discuss it, however, with Mr. Schilling as the counsel, as to the position of the bank in the matter and whether it would be legally justified in making the entry. "Q. Did he tell you to make the entry? A. He compared with me in making the entry. I made the entry on my responsibility. He told me that I could legally do so."

Q. Now, Mr. Tobey, the subject matter of the \$113,216.50 first came to your personal attention

(Testimony of Lloyd J. Tobey.)

about two o'clock in the afternoon of November 19, 1948, did it not? A. That is correct.

Q. When Mr. Kenneth Johnson of your bank's legal department, and Mr. Libby, branch supervisor whose jurisdiction contains the Bakersfield branches, came to you in your office in San Francisco; correct? A. That is correct.

Q. They told you that there was a matter which involved a collection item and that it had been discussed between Mr. LeRoy of the Merchandise National Bank the day before with Mr. Duncan of your banks and bankers division and with Mr. Johnson, is that right?

A. I don't recall them saying that. They did come to me.

Q. Now perhaps your memory has faded a bit since your deposition. I will call your attention merely to page 18, line 15: "I [104] can't recall the words at that time, but I am sure—I feel sure that they told me that it involved this collection item, and they told me that had been discussed by Mr. Duncan, Mr. LeRoy and Mr. Johnson on the day previous and that it could result in a loss." Is that correct? A. That is correct.

Q. So they told you that it could result in a loss to your bank? A. That is correct.

Q. And they also told you at that time unless the \$113,000 could be credited to Lofendo's account, that account would show an overdraft of \$82,000 odd dollars and Bank of America would suffer a loss in that amount, is that right? A. Yes, sir

(Testimony of Lloyd J. Tobey.)

Q. And it is a fact, of course, that unless the \$113,000 was so credited, there would have been such an overdraft uncovered?

A. That is correct.

Q. Following the 19th you went down to Bakersfield and you personally made an investigation of the records there and you can testify to that of your own knowledge now, can you not?

A. Yes.

Q. You were told of this before talking to Mr. Schilling of your legal department that afternoon; that is right, is it not? A. That's right.

Q. Then it was later in the day after you had been told this by Mr. Johnson and Mr. Libby that you personally caused that [105] \$113,000 to be charged against the Merchandise account—I am getting time relationships now—is that right?

A. That's right.

Q. At the time you caused this charge to be made, no one had told you, had they, that on the day before Mr. LeRoy had told Mr. Johnson of your legal department and Mr. Duncan of your banks and bankers division, that the advice of credit was revoked and was not to be acted upon when received? Nobody had told you that at the time you made the debit charge?

A. That is correct.

Q. And also at the time you made that debit charge, nobody showed you, nor did you know anything about a certain letter which Mr. LeRoy had

(Testimony of Lloyd J. Tobey.)

given to Mr. Duncan the day before, is that right?

A. That's right.

Q. You learned of that letter some days after you made that charge; is that correct?

A. The next day, as I recall it.

Q. And at the time you took it upon yourself to make that charge, you didn't know anything about—nobody had told you about the letter which Mr. Duncan had written the day before to Mr. Etribou instructing Mr. Etribou to follow the directions of Mr. LeRoy? You knew nothing about any such letter? A. That is correct.

Q. So that when you took it upon yourself to make this charge against the Merchandise account there were a series of things to [106] which we have just referred of which you were wholly ignorant and of which you didn't learn until the next day? A. That is correct.

Mr. Lasky: That is all for the time being, Mr. Tobey.

#### Recross-Examination

By Mr. Erskine:

Q. And had you at any time prior to November 19, 1948, ever had anything to do with the account—the "due to" account of the Bank of America, with the Merchandise National Bank?

A. No, sir.

Mr. Erskine: That is all.

The Court: Very well, gentlemen. I think we have probably arrived at a time to take a short

(Testimony of Lloyd J. Tobey.)

recess. The Court will stand in recess until 25 minutes after 3:00.

(Recess.)

Mr. Lasky: If your Honor please, a matter has just been brought up by both counsel representing the inter-pleaded defendant, Cy Mouradick and the trustee in bankruptcy of the United Produce Company. They would rather not be sitting around the courtroom as the controversy between the two banks goes on. They wish to be excused, and I understand they agree that wherever Mr. Erskine and I stipulate to testimony or evidence to hasten it along, it may be deemed to be their stipulation, and they will then return to the courtroom whenever they think it appropriate to protect their own interests. [107] Is that correct?

Mr. Bianco: That is substantially correct. My name is Mr. Bianco. I represent Mr. Mouradick, who is an attacking creditor. The interests of my client do not come into effect unless the Bank of America is successful in the litigation, at which time there would be a credit in the Lofendo account in the East Bakersfield branch of some \$30,000, and I understand Mr. Bradley's position; he represents the trustee in bankruptcy of the United Produce Company and his interests do not come into play unless the Bank of America is successful, in which event then he and I will probably have to litigate who has the prior right.

The Court: Then it will be at the conclusion of

all the evidence between the plaintiff and the defendant?

Mr. Bradley: That is correct, your Honor.

The Court: You wish then to put some evidence in?

Mr. Bradley: If the Court should find in favor of the Bank of America, then Mr. Bianco and myself on behalf of our clients would want an opportunity to present our cases, our claims to the \$30,000.

The Court: Of course, I do not anticipate I am going to be able to decide this matter from the bench at the conclusion of the evidence.

Mr. Bianco: Then your Honor may want to set a definite hearing some time after that [108] decision.

The Court: At the conclusion.

Mr. Bianco: That is satisfactory.

Mr. Bradley: At the conclusion of all the other evidence then Mr. Bianco and myself could come in and put on all our evidence to support our claims.

Mr. Bianco: As I understand His Honor, he may want to defer that until he has decided the case as between the two banks.

The Court: No, I don't think so. I think I will hear the evidence before a decision is made.

Mr. Bianco: That is satisfactory.

Mr. Erskine: I will keep you advised as to when that time is arriving.

The Court: If you are otherwise satisfied as to the situation, it is up to you to protect yourselves. You have my permission to absent yourself.

Mr. Bianco: Thank you, your Honor. And so far as the record is concerned, so far as any stipulation as to the facts material to the determination of the case between the two banks is concerned, I will join in any stipulation made by those two counsel.

Mr. Lasky: One stipulation Mr. Erskine hope to enter into regarding the relationship between the defendant and the United Produce Company may also have a bearing upon your interests.

Mr. Bradley: That particular stipulation you mentioned, if it amounts to a stipulation that United Produce Company was [109] engaged in fraud, I do not know that I could say offhand now that I could join in.

Mr. Lasky: We will submit the proposed stipulation to you beforehand.

Mr. Bianco: Very well. We certainly would not want to stipulate ourselves out of court to this statement you are now making. My thought was as far as those stipulations that may be necessary for the determination of the controversy between the two banks we raise no objection to.

Mr. Lasky: Very well. Then if that issue should arise later, if we ever get to the later point, we will handle it when we get to it.

The Court: It is perfectly agreeable with me. As I say, it is your responsibility in the matter.

Mr. Bianco: Thank you, Your Honor.

Mr. Bradley: Thank you.

Mr. Lasky: One correction, if the Court please. I am informed I misspoke myself in a question to Mr. Tobey at the end where I asked him if he

knew about a certain letter of Mr. Duncan, and I am advised I said, "To Mr. Schilling." I meant to say, "To Mr. Etribou."

Mr. Erskine: I will stipulate that that can be changed.

The Court: And the answer is the same.

Mr. Erskine: And the answer is the same.

The Court: Very well. [110]

### FRANK ESTRIBOU

called as a witness on behalf of the plaintiff under Rule 43 (b), Rules of Civil Procedure, was sworn and testified as follows:

The Clerk: Will you state your name to the Court, please?

A. Frank Etribou.

Mr. Lasky: I am also calling Mr. Etribou as an adverse witness under Rule 43(b).

### Direct Examination

By Mr. Lasky:

Q. Mr. Etribou, you are manager of the East Bakersfield branch of the Bank of America?

A. I am.

Q. And you have been that for over 15 years?

A. Correct.

Q. The Merchandise National Bank, the plaintiff in this case, has never had an account with your branch? A. Never to my knowledge.

Q. But in 1948, your branch did have a commercial account which stood in the name of one Frank C. Lofendo? A. That is correct.

(Testimony of Frank Etribou.)

Q. Which had been opened up on March 12, 1948, correct?

A. I couldn't verify the date without looking at the records. The signature card will indicate the date it was opened. [111]

Mr. Erskine: I will stipulate that is so subject to correction.

Mr. Lasky: I have the signature card. If you can verify it right now, we can get the stipulation and pass on.

Mr. Erskine: March 12, 1948.

The Court: Very well. It is so stipulated.

Q. (By Mr. Lasky): Mr. Lofendo was a stranger to you, was he not? A. Correct.

Q. As a matter of fact, you met him only once?

A. Just once, at the time the account was opened. [112]

Q. And never thereafter? A. Never.

Q. Stranger to everyone in the bank, was he not? To all your officers?

A. To the best of my knowledge, yes.

Q. It is a fact, is it not, from time to time, checks for deposit to the Lofendo account or for collection were received by your branch through the mail? A. That is correct.

Q. And these checks would arrive in an envelope or envelopes addressed to the bank, which envelopes contained checks and duplicate deposit slips?

A. I learned of that afterwards. I had nothing to do with the incoming mail.

(Testimony of Frank Etribou.)

Q. You know it to be the fact that all but the original opening of the deposit of March 12th did come in by mail? A. But what?

Q. The original opening?

A. The original was cash over the counter, that is correct.

Q. And everything thereafter was by mail?

A. Yes.

Q. It is a fact that from time to time checks were drawn by United Produce Company to the order of Frank C. Lofendo for delivery to your branch for collection?

A. Mailed to us. [113]

Q. Mailed, yes, and received and accepted by your branch for collection only, correct?

A. In some cases, yes. Some were immediate credit.

Q. I have not asked you about the immediate credit. I asked you is it a fact from time to time there were checks which you accepted for collection only? A. Correct.

Q. And on such items, that is, checks which you received for collection only, your branch passed no credit to the account until and unless the checks were collected and the funds received?

A. If they were handled for collection, yes.

Q. That is the way it was done. If they were handled for collection, no present credit?

A. That is correct.

Q. And no credit until credit was effected.

Mr. Erskine: Just a second. That calls for the

(Testimony of Frank Etribou.)

conclusion of the witness, your Honor, and it is getting to an important phase of this matter. What is meant by "collection effected"? That is the conclusion for which he is calling. That is a legal matter which this Court has to decide. I would rather have Mr. Lasky state the facts that he wants to show and I think I can agree to them. I do not want him to call for conclusions of this witness that might be binding on us in some way.

Mr. Lasky: I think the witness has already answered the—— [114]

The Court: The Court understands that, and any conclusions of the witness are going to be disregarded by me in any event, but it does seem to me you can stipulate as to the facts of the transactions and the method in which this account was handled. You both apparently have the knowledge. Why have the witness sit up here for the next half hour and tell me all about it when you can make a stipulation in a page or two to cover the whole thing? Of course, the conclusions—you can't stipulate as to the conclusions any more than the witness can testify as to conclusions, but as to the facts—it seems to me, gentlemen, really that we might very well spend a few hours together in chambers, and if you will outline the testimony you intend to produce step by step, you may very well stipulate as to what the facts are. As to conclusions, of course, that is another matter. It seems to me if some thought is given to this matter we can eliminate a tremendous amount of proof and

(Testimony of Frank Etribou.)

it might be well, if you think that is a proper method to pursue, we might stop as of this time, you gather your own thoughts together on the matter, and tomorrow morning, instead of having some witnesses here, let up spend tomorrow morning in chambers seeing what we can do to eliminate unnecessary proofs.

Mr. Lasky: I think a lot can be done but I think it would be done, if you will pardon me for saying so, more expeditiously as we go along with the witnesses. I can stop from time to [115] time and state a stipulation.

The Court: The witness is on the stand here now and everything he has so far testified could be stipulated to. If you fellows would stipulate, you wouldn't be here at all but all you do is dictate a stipulation, prepare one, file it and I could read it. I am in favor of eliminating the continual questions and answers. It doesn't help me. That is what you are up against. You are up against my deciding the thing, and it isn't going to help me to have witnesses up here testifying on things that there is no issue about. I will do a lot better if I have a stipulation and can look at it and decide, "Now, that is out of the picture. This is the fact, what is the answer to that if that is the thing I have to decide?" I sit back now and have to listen to him, and when I get into chambers I will say, "What did he testify to?" Then I have to go and get the record, and I have to read that. If it is in the form of a stipulation of facts, it is a simple matter. I

(Testimony of Frank Etribou.)

will tell you, you are going to facilitate the trial and the decision a great deal if we can eliminate it. I would suggest that we recess at this point, that counsel spend some time together right now discussing the matter and the proofs that each expect to present, and see what you can do, and then tomorrow morning come to chambers and then let us all go over it together and see what we can eliminate.

Mr. Erskine: That would be entirely agreeable to me, and [116] I think a great many facts and a great many documents could be agreed on.

Mr. Lasky: We have no trouble with documents.

The Court: Documents—as far as they are concerned, we do not need the documents. You can stipulate as to what the documents show, the particular documents. What is the use of piling the records up here with ledger after ledger, or whatever accounts you are going to show, when all you have to do is say there was an account showing a certain thing?

Mr. Lasky: I think what your Honor says is correct in major part. We always come, sooner or later, to places where we differ in the inferences—

The Court: The inference, whether the proof is put in by stipulation or by what the witness says on the stand, is the same thing. The Court has to draw the inference, and the one is just as much evidence as the other.

Mr. Lasky: Your Honor, I assume, may want, when you may reach the point where you desire, to

(Testimony of Frank Etribou.)

know the credibility of witnesses where there is a conflict.

The Court: Oh, of course. When you get to those matters in which there is a real conflict—you have talked about conversations that were had, where one says one conversation occurred and another says another conversation. That is a matter the Court must reasonably look at the witness and find out and see himself. There may be some questions that he wants [117] to ask after you are through asking questions. That evidence will be put on here. But the other matters, there is no real conflict on, and it is just a question of me drawing an inference from the record or the general procedures in the business.

Let us eliminate all of that, and I think it would be well for you to spend some time together before you get into chambers tomorrow.

Mr. Lasky: We can sit down now and talk it over.

The Court: If you will come to chambers, say, at ten o'clock tomorrow morning, and we won't have a session of Court until tomorrow afternoon. It may be in two or three hours tomorrow morning we might really accomplish something, and so on that basis the Court will stand at recess at this time until two o'clock tomorrow afternoon, and you gentlemen come to chambers at 10 o'clock tomorrow morning. [118]

Friday, June 16, 1950—2:00 P.M.

The Clerk: Merchandise National Bank vs. Bank of America, on trial.

Mr. Lasky: If the Court please, I understand, of course, while Mr. Bianco is not physically in court, he doesn't need written notice. I presume also that Mr. Erskine is daily in touch with him, and I would request Mr. Erskine to notify Mr. Bianco to be present on Monday, because the attorney for the trustee in bankruptcy of United Produce Company and I desire to make a motion with respect to Mr. Mouradick in the case.

The Court: Will you be in touch with him? That is the simplest way.

Mr. Erskine: I can call him. I saw him in court the other day. He told me that he was going to be trying a case in Bakersfield Monday, a jury trial. I know he won't be able to be here.

Mr. Lasky: Then we can defer it. Request him to be here when he can.

Mr. Erskine: That is all right.

The Court: There will be no prejudice because the man wasn't here at a particular time. The time element is not going to interfere.

Mr. Erskine: I'm afraid that will be later next week.

The Court: I don't suppose, or do you have in written form [119] the stipulation with reference to which we talked this morning?

Mr. Lasky: No, it isn't ready yet. I assume that we may proceed upon the assumption that it would come in.

The Court: Proceed on the assumption that it is now in.

Mr. Lasky: It may be in the record later, but for the time being we will presume it is in. The written stipulation will be in Monday. We will get the written stipulation in Monday.

Mr. Erskine: The one we discussed this morning?

Mr. Lasky: Yes.

Mr. Erskine: As soon as you write it up, send it over.

The Court: We will presume it has been made for the time being. Proceed.

Mr. Lasky: Yes.

Mr. Erskine: That is right.

Mr. Lasky: For the sake of the record, I think it should be shown that Mr. Etribou who was on the stand has been withdrawn without prejudice to calling him back later.

The Court: Very well.

Mr. Lasky: Mr. Messenger, will you take the witness stand, please?

FREDERICK C. MESSENGER  
called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court?

A. Frederick C. Messenger. [120]

Direct Examination

By Mr. Lasky:

Q. What is your residence, Mr. Messenger?

(Testimony of Frederick C. Messenger.)

A. In Park Ridge, Illinois.

Q. Near Chicago?

A. A suburb of Chicago.

Q. And what is your occupation?

A. Banker.

Q. With whom are you employed?

A. Merchandise National Bank of Chicago.

Q. In what capacity?

A. Vice-president and controller.

Q. How long have you had that position?

A. Since January, 1949.

Q. Were you controller before you were vice-president and controller? A. Yes, I was.

Q. For how long have you been controller?

A. From 1942.

Q. And prior to that date were you with that bank? A. I was.

Q. In what capacity? A. Auditor.

Q. And prior to your employment with the plaintiff Merchandise National Bank, how long have you been a banker? A. Since 1913. [121]

Q. What positions have you occupied with other banks and banking organizations?

A. The position of auditor, controller, vice-president, executive vice-president.

Q. Have you ever occupied a position as bank examiner for any organization?

A. I was an examiner for the Federal Deposit Insurance Corporation.

Q. For how long?

A. A period of four years.

(Testimony of Frederick C. Messenger.)

Q. When was that?

A. 1933, October, to October, 1937.

Q. Now as auditor-controller of the Merchandise National Bank, what was the character of your duties?

A. I am the chief accounting officer of the bank in charge of operations, systems, the preparation of forms, in charge of all expenditures of the bank, the preparation of budgets, investment program.

Q. And all accounting matters?

A. That is right.

Q. On what day did you learn that a certain advice of credit for \$113,216.50 had been sent out to the East Bakersfield branch of the Bank of America, or to the Bank of America?

A. November 17, 1948.

Q. And will you state the circumstances under which you learned [122] of that fact?

A. On that day—

Mr. Erskine: Just a second, if the Court please. It seems to me that what was told this witness—

Mr. Lasky: Yes, you are quite right. I will instruct the witness I don't want him to tell anything he has been told, but only the things he himself saw and did.

The Court: Very well.

A. On November 17, 1948, three items totalling \$57,000, drawn by Frank C. Lofendo on the East Bakersfield branch of the Bank of America were returned to the Merchandise National Bank for non-payment. On that day the three items were

(Testimony of Frederick C. Messenger.)

presented to me by our collection teller who handles returns.

Q. Then what happened then? And again, just relate what you saw and did, but don't tell me what anybody said to you.

A. At that particular time I referred those three checks to the president of the bank, and likewise to the vice-president of the bank who was handling that account, and that—at that particular moment the matter with reference to those returns was placed in the hands of the vice-president handling that account.

Q. All right. Then what else did you observe yourself?

A. I was in the presence when Mr. Redheffer, our president, instructed Mr. Reichwine to contact—

Mr. Erskine: Just a second. I suppose that that is [123] hearsay, if your Honor please.

Mr. Lasky: Well, it is in the character that your Honor referred to yesterday of what went on internally in the bank, the same as when the message came through the East Bakersfield branch that reached Mr. Etribou.

The Court: Yes. What is it? It is in the nature—

Mr. Lasky: Preliminary to the fact that someone came into the bank, and this witness saw somebody come into the bank.

The Court: It is not to prove the truth of what he said?

(Testimony of Frederick C. Messenger.)

Mr. Lasky: No, not at all; not offered for that purpose.

The Court: Do you have any objection to that on that ground?

Mr. Erskine: I suppose, your Honor, in matters of this sort that something of this nature would come in.

The Court: It has to come in for me to understand it.

Mr. Erskine: In other words, if it doesn't, the story isn't there; but I don't believe the witness ought to testify to what he told Mr. Redheffer or what Mr. Redheffer told him.

The Court: It isn't offered for that purpose.

Mr. Lasky: I can try a leading question, and that will cover it.

Mr. Erskine: All right, go ahead.

Q. (By Mr. Lasky): Did you personally see Mr. Rosenthal, vice-president of the United Produce Company, come into the bank that day? [124]

A. Yes, I did.

Q. Subsequently to the events you have related?

A. That is correct.

Q. Did you see him go into conference or talk with Mr. Redheffer, the president, and with Mr. Reichwine? A. Yes, I did.

Q. You weren't yourself present at that conversation? A. I was not.

Q. Without stating what you were told, I want you to answer this question: Were you thereafter told what Mr. Rosenthal had said to Mr. Redheffer?

(Testimony of Frederick C. Messenger.)

A. Yes, sir, I was.

Q. And after you were told that, did you look into the United Produce account yourself?

A. I personally did.

Q. And was it then that you discovered the \$113,000 collection item that we have talked about?

A. Yes.

Q. Now did you on that day subsequently to what you have just related, have a conversation with Mr. Etribou, manager of the East Bakersfield branch of the Bank of America? A. I did.

Q. And what sort of conversation was it, in person or by telephone? A. By telephone. [125]

Q. When did the conversation occur? What time of day?

A. It started at 4:17 p.m. on that day.

Q. How do you fix the time?

A. Pencil memorandum notes that I have made at the time the conversation was taking place.

Q. Did you dictate out such a memorandum when you hung up the telephone? A. I did.

Mr. Lasky: Now you are familiar with these memos, Mr. Erskine. You know these?

Mr. Erskine: Yes.

Q. (By Mr. Lasky): And I will ask you, Mr. Witness, whether these two sheets that were marked defendant's exhibits 12 and 13 on your deposition in Chicago—will you look at them and tell us whether those are the memos that you referred to?

A. These are the memorandums I dictated after the conversation.

(Testimony of Frederick C. Messenger.)

Q. And how soon——

Mr. Erskine: Would you pardon me one second. I wonder if we could stipulate, just to get this in the record, that the witness is speaking of Chicago time?

Mr. Lasky: Yes, we are speaking of Chicago standard time, central standard time.

The Witness: That is correct.

Mr. Erskine: I would like a stipulation that in November, 1948—as a matter of fact, all during the fall and winter of [126] 1948, up to the first of the year,—California was on daylight saving time.

Mr. Lasky: I believe that to be true, and so stipulate.

Mr. Erskine: So that instead of two hours' difference between Chicago and San Francisco or Bakersfield there was only one hour difference in time.

Mr. Lasky: Well, my mind doesn't function fast enough to know whether it would be one hour or three hours.

The Court: I always miss which direction I am going on that.

Mr. Lasky: But it was daylight saving time in California.

Mr. Erskine: Yes.

Mr. Lasky: We can figure out ourselves later whether it was one hour or three.

Mr. Erskine: We will stipulate then that in November, 1948, when time is mentioned relating

(Testimony of Frederick C. Messenger.)  
to occurrences in Chicago it is central standard time.

Mr. Lasky: That is right.

Mr. Erskine: When time is specified about events which transpired in California it was on Pacific daylight saving time.

Mr. Lasky: That is right.

The Court: Very well.

Mr. Erskine: I request that these two memoranda be now marked as plaintiff's exhibits 3A and B for identification.

The Clerk: Plaintiff's exhibits 3A and 3B for identification. [127]

Q. (By Mr. Lasky): Now I don't know whether I asked you this: How soon after the telephone conversation was over did you dictate those two memoranda?

A. It was only just a short time. The dictation took place at 4:30 p.m.

Q. Now without referring to the memoranda, will you state who put in the telephone call?

A. I put in the telephone call through our telephone operator.

Q. And whom did you ask for?

A. I asked for the manager of the East Bakersfield branch, Bank of America.

Q. Now will you relate the conversation as you remember it?

A. I might not be able to keep all the different parts of the conversation just in the order they took place, but when the telephone was answered

(Testimony of Frederick C. Messenger.)

a man who introduced himself to me as Mr. Estri-  
bou, manager of the branch, answered the phone.  
And I told him who I was. And he said, "Now  
hearing that the call was coming in from the Mer-  
chandise National Bank, I assumed that perhaps  
the conversation would relate to the Lofendo and  
the United Produce matters, so I have asked my  
accountants to bring all the records of the account  
to my desk."

While he was waiting for the records to be  
brought to him, I told him that the United Produce  
Company had perpetrated a fraud on us or had  
pulled a game, I have forgotten which words, and  
that it had us over a barrel, and that one of the  
officers [128] of the company had admitted to the  
Merchandise National Bank that they had pledged  
fraudulent accounts as collateral to us.

I told Mr. Etribou that I had a list of a number  
of checks that our records indicated had been re-  
ceived from Lofendo, and it was my desire to ascer-  
tain whether or not any of those checks had been  
paid.

Q. Well now, let me interrupt you at that point  
to ask you did you have with you then a list of  
checks? A. I did have.

Q. What sort of checks were listed on that list?

A. It was checks that had been handled by our  
bank through remittances that had covered the pe-  
riod from November 4, up to date.

Q. Let me ask you this: By whom were the  
checks drawn?

(Testimony of Frederick C. Messenger.)

A. The checks were drawn by Frank C. Lofendo.

Q. Over his signature?

A. Over his signature.

Q. And who was the payee?

A. United Produce Company.

Q. How did they come into the Merchandise National Bank?

A. They came in as remittances on assigned accounts that were pledged as collateral to the Merchandise National Bank.

Q. These checks had come into your bank after November 4th?

A. That is correct; November 4th, and thereafter.

Q. 1948? [129] A. Yes.

Q. What had been done with them?

A. They had been handled through the discount department and had been forwarded to the Bank of America for payment.

Q. When had you had this list prepared?

A. The list had been prepared after we had knowledge that a fraud had been perpetrated on the Merchandise National Bank that day.

Q. With relationship to the time that Mr. Rosenthal of the United Produce Company came into your bank on November 17th, was the list prepared before or after? A. It was prepared after.

Q. Getting back to the conversation, I think you mentioned to Mr. Etribou that you had such a list before you? A. That is right.

Q. Will you continue with the conversation?

(Testimony of Frederick C. Messenger.)

A. And I stated that I would call off the amounts and he could inform me whether the checks were paid. He stopped me and suggested that he call off the amounts of the checks that were paid on their records, and that I could check them against the list that I had.

Q. And was that done?

A. He called off the amounts, and I checked off the items that had been paid, and that left a considerable number of items that were still open. [130]

Q. Let me ask you this: As he called off an item that he said had been paid, did you mark it off your list? A. I did.

Q. When he was through did he say that that was all their records showed had been paid?

A. That is right.

Q. After you had marked off the items he called off, did you still have on your list a number of items? A. That is right.

Q. What did they total?

A. In excess of \$500,000.

Q. Let us get back for a moment to your conversation with Mr. Etribou. What else was said?

A. I informed him—I told him that on November 15th we had mailed an advice of credit covering a collection of six checks of Frank C. Lofendo forwarded to us by their branch, totalling \$113,216.50, and that the advice of credit had been sent out in error. I asked him whether or not the advice had been received by him. He told me that the advice had not been received by him. I told him

(Testimony of Frederick C. Messenger.)

that it was our desire that their bank not make any entry on that advice of credit as we were rescinding the credit, and Mr. Etribou told me that he would be happy to work with Merchandise National Bank; that insofar as the Lofendo account was concerned, they had not been paying against uncollected funds, they were in the clear; they had a [131] balance of \$699.02. He stated that they would work with us; they would do anything we wanted them to do; they would pay checks that we would present to them for payment or they would not make entry, whichever we desired.

Q. Now you used the word "we"; are you purporting to quote the "we"? When you say "we," whom do you refer to?

A. The East Bakersfield branch of the Bank of America. I informed Mr. Etribou that it was not our desire that they pay checks, but we were rescinding the advice of credit; the Merchandise National Bank didn't want them to make entry on the credit. Mr. Etribou said, "I agree with you; then we won't make entry."

Q. What further was said?

A. He told me that on that date they had received, I believe he said, four checks.

Q. Pardon me; what date?

A. November 17th.

Q. I see.

A. They had received, I believe it was four checks; I am not certain as to the number, of the United Produce Company from Frank C. Lofendo

(Testimony of Frederick C. Messenger.)

for deposit, the checks totalled \$87,000, and that they were not accepting these checks for deposit or for collection.

Q. And can you recall anything further having been said?

Mr. Erskine: Pardon me; I didn't quite hear that question. [132]

(The Reporter read the record.)

A. He also told me on that date that they were returning an item for some approximately \$21,000, I have forgotten the amount, that was presented for payment on that date, but they were dishonoring it.

Q. (By Mr. Lasky): Now do you recall, without refreshing your memory from a memorandum, anything else that was said?

A. Just this moment I don't recall.

Q. Was there any reference in that conversation to the name of Mr. LeRoy?

A. Oh, yes; I told Mr. Etribou that Mr. LeRoy, one of our vice-presidents, was flying out to California that night and that he would be in Bakersfield the following day and that it was our desire that he deliver to Mr. LeRoy the advice of credit that we had rescinded. Mr. Etribou stated that it was a little problem sometimes getting from the airport to the bank, and that if Mr. LeRoy would 'phone him upon arrival, he would drive to the airport and bring Mr. LeRoy back to the bank.

Q. Now was there any discussion or conversation as to any other outstanding collection letters?

(Testimony of Frederick C. Messenger.)

A. Mr. Etribou told me that they had a balance of \$699.02. He said, "We have two collection letters totalling \$165,000, sent to the Merchandise National Bank of Chicago, upon which we have not received advice of credit or returns." He said, "One of them is the \$113,216.50 that we have been talking about, and there is [133] another one for \$52,000. Those are the only items which we have sent to the Merchandise National Bank which we have not received returns on."

Q. Now at this time have you told everything you can presently remember about that telephone conversation?

A. All that I can remember at this moment.

Q. Now I am going to hand you, with the Court's permission, documents marked plaintiff's 3A and 3B for identification, which you have identified as the memorandums you prepared after the conversation and ask you whether, refreshing your memory from those, there is anything else that comes back to your mind as having been said during the conversation.

A. I believe I have covered it.

Q. All right. Now, Mr. Messenger, at the time you talked to Mr. Etribou on November 17th, did you know that the Bank of America had not yet given credit to Lofendo for the \$113,000?

A. Yes.

Q. And will you explain how you knew that?

A. Well, there were two ways in which I knew. One was the admission of Mr. Etribou that there were two outstanding collections that they had not

(Testimony of Frederick C. Messenger.)

received credit on from us, the \$113,000 and \$52,000 items, and, secondly, it is a practice of banks that when items are sent for collection—

Mr. Erskine: Just a second. If your Honor please, I would like to interrupt the witness. I didn't make any objection to [134] the question because it didn't seem to me to be in proper form. The reasons for the witness knowing whether or not Etribou had taken certain action do not strike me as material, but the practice of the bank in matters of this sort is certainly not material.

Mr. Lasky: Practice of banks.

Mr. Erskine: Practice of banks in matters of this sort is not material. The witness was examined with reference to the conversation between Etribou and the witness. That conversation is offered for the purpose of showing, I presume, that the Merchandise Bank revoked the credit and that Etribou agreed to the revocation of the credit. Now what bearing can the practice of banks have upon that subject? [135]

Mr. Lasky: I will explain that Mr. Messenger, when he advised Mr. Etribou that the advice of credit was revoked, was acting upon that the Bank of America had not received it or acted upon it, and therefore there would be no estoppel standing in the way of revocation. He said he knew it in two ways. He has explained Mr. Etribou told him he had not received it or given credit, and he was about to explain something about the meaning and

(Testimony of Frederick C. Messenger.)

significance of collection letters in the banking industry.

Mr. Erskine: That is a matter for the Court to determine and not for the witness, at least on direct examination, to state. It may be if his state of mind about the situation is inquired into, his understanding with respect to the practice of banks in matters of this sort and the law might be proper cross-examination, but he certainly cannot sit up there and state a legal rule as a reason for believing that the Bank of America had not received the advice of credit.

Mr. Lasky: I am not asking for a legal rule; I want to know the significance of this collection letter.

The Court: The objection is overruled.

Q. (By Mr. Lasky): What is the significance of a collection letter?

A. The significance of a collection letter is that an item is sent out for collection to another bank with a specific request for the collection of the item, and the remittance of the [136] funds either in the form of a check or credit, and on those items, why, generally speaking, no credit has been advanced until after the remittance or credit has been received.

Q. No credit has been advanced by whom?

A. By the sending bank to the customer from whom they received the item.

Q. Does a collection letter differ from a cash letter? A. Yes, it does.

(Testimony of Frederick C. Messenger.)

Q. Will you explain in what respect?

A. A cash letter covers items sent out in normal channels for collection with other items generally; in other words, there is a large group of items going out in one letter. The cash letter requests collection, but there is the right of revocation of any item contained in that letter if not paid. There is a conditional credit granted by the receiving bank to the sending bank conditional upon the payment of the items enclosed.

Q. In the case of the cash letter, does it indicate in the banking fraternity anything with respect to whether or not credit has been entered at the sending end when the matter has gone out?

A. The general indication is that credit has already been extended on the items.

Q. Coming back to the conclusion of your conversation with Mr. Etribou—

The Court: Let me ask you this: Your description of [137] the custom as to what the forwarding bank does with the item after it has forwarded a matter for collection is based upon your experience in the banking business? A. That is correct.

Q. What has your experience been in the banking business with banks on the west coast?

A. The banks I have been connected with have sent items out both by cash letters and collection letters to west coast banks in, oh, hundreds and perhaps thousands of cases.

Q. You have sent collection letters from your bank to west coast banks, but what is your knowl-

(Testimony of Frederick C. Messenger.)

edge of what west coast banks which forward letters of collection to you, what is your knowledge and experience there as to what they do?

A. The general practice, the knowledge that I have is the practice is identically the same with what it is from any other point in the United States.

Q. Upon what do you base that? What has been your experience or what is your knowledge upon which you state a bank on the west coast sending a collection letter does? What has been your experience that would qualify you to say what a bank out here does when a collection letter is sent?

A. I have never been in California before today, but I have over a period of about 13 years been a member of an association of bankers who meet annually each year and we have discussed and redisussed all kinds of banking problems in these association [138] meetings.

Q. (By Mr. Lasky): Is it a national association?

A. It is a national association of bank auditors and controllers.

Q. But in response to the Court's inquiry you do say you have never been in California before?

A. That is correct.

Q. When you had finished your telephone conversation with Mr. Etribou I think you said you had a list that still had a group of high checks on it? A. That is correct.

Q. Totaling how much?

A. In excess of \$500,000.

(Testimony of Frederick C. Messenger.)

Q. Did those checks ever get paid?

A. None of them were ever paid.

Q. Came back to your bank unpaid?

A. That is correct.

Mr. Lasky: I have here a group of checks marked Defendant's Exhibit 11 with various subdivisions thereof with Mr. Messenger's deposition, which was taken in Chicago, and I ask that they be marked at this time for identification as a group.

The Court: Isn't that one of the matters that has been stipulated on as to the amount?

Mr. Lasky: No, I do not think so. It was not covered; we spoke about it but apparently could not stipulate upon it. I do not know why. [139]

The Court: Very well.

(The group of checks referred to was thereupon marked Plaintiff's Exhibit 4 for identification.)

Mr. Lasky: I may say I do not propose to offer these in evidence but I want them identified because it may become necessary to refer to them later on in rebuttal or something of that character.

Q. I show you here a group of checks, Mr. Messenger. I ask you to look them over and tell me whether or not those are the checks which still remained on your list. Here is another one that belongs in there, I believe. You can staple it to there. A. Yes.

Q. The checks just referred to, having been marked Number 4 as a group, were, I think you

(Testimony of Frederick C. Messenger.)

said, received from the United Produce Company by your bank between November 4th and November 17th? A. That is correct.

Q. And in what connection had they been so received from the United Produce Company?

A. I would like to refer to them before I give that answer, Mr. Lasky.

Q. Sure.

Mr. Erskine: The checks?

The Witness: Yes, please. Yes, sir.

Q. (By Mr. Lasky): Will you answer the question? [140]

A. Yes. Those checks were received by the Merchandise National Bank from the United Produce Company, accompanied by a remittance sheet covering payments on accounts assigned as collateral by the United Produce Company to their loans.

Q. When they were received by Merchandise National Bank from United Produce, did they result in any credits of any kind to the United Produce Company account with Merchandise National Bank?

A. They resulted in conditional credits, subject to the right of charge-back if the checks were not paid.

Q. In connection with the loans were there promissory notes taken from United Produce Company? A. Yes, there were.

Mr. Lasky: Mr. Erskine, when we were in Chicago we entered into a stipulation that one note, which was marked Plaintiff's 3 on Messenger's

(Testimony of Frederick C. Messenger.)

deposition, could be taken as typical of the whole group, and the rest of the notes were listed in the deposition. I have had that all copied out of the deposition, and I ask you to stipulate that this note and what I have copied out of the deposition listing the other notes truly reflects all the notes that were in the account at that time.

Mr. Erskine: Subject to a check, I will agree. I am sure it is right. It is a long list.

The Court: Very well. [141]

Mr. Lasky: I will ask that these two documents together, upon the basis of the stipulation as a sufficient authentication, be marked as plaintiff's next exhibit in order.

(The documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit 5.)

The Court: Very well. It is admitted in evidence subject to the check here.

Mr. Lasky: I shall not stop to read to the Court the passage of the note, but with your Honor's permission I will briefly state that it provides that the bank has security, not only the security there mentioned, certain accounts assigned, but any and all other properties of the customer, and that any monies which the bank might owe the customer could at any time be applied at once by the bank, either before or after any debts to the bank were due if the bank so desired. In other words, it gave a complete right of turning back all conditional

(Testimony of Frederick C. Messenger.)

credits. We can refer to that later in appropriate argument.

Q. Mr. Messenger, reference has been made to assignments, receivables. Was there a form of assignment used? A. Yes, there was.

Mr. Lasky: Now, I think, Mr. Erskine, you will stipulate that one of these I have here marked in Chicago is the form of assignment which was used with respect to all the receivables assigned?

Mr. Erskine: I will so stipulate. I am sure it is correct, [142] subject to a check.

The Court: Very well.

Mr. Lasky: I ask that this be marked as a specimen example of them all as plaintiff's exhibit next in order. I offer it in evidence.

The Court: It is so admitted.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Lasky: I may call the Court's attention that it has a provision in there:

"The undersigned United Produce Company agrees to endorse, whenever it receives checks from its customers, to endorse them over to the bank for collection and the bank will take them and handle them for collection."

Q. Now, did the United Produce Company in the course of its account with your bank, Mr. Messenger, use a form of deposit slip?

A. Yes, they did.

(Testimony of Frederick C. Messenger.)

Q. I ask you whether this form that I now show you is the form that was used in the United Produce transactions with you?

A. This is the form that was used.

Mr. Lasky: I offer this in evidence as plaintiff's next exhibit.

The Court: It is admitted without objection.

(The document referred to was thereupon received in [143] evidence and marked Plaintiff's Exhibit 7.)

Mr. Lasky: I call the Court's attention to a provision on the back that is called "Agreement":

"In receiving and handling items for deposit or collection \* \* \* all items are credited or cashed subject to final payment in cash or solvent credits."

Again,

"The bank may charge back any item at any time before final payment, whether returned or not."

Again,

"It may decline to honor checks or pay checks drawn against conditional credits."

Mr. Erskine: Are you suggesting that when the checks of the debtor company and the remittance sheets by the bank, the deposit tag from which you just read accompanied such checks?

Mr. Lasky: No, I did not say that. I said the note, the assignment agreement which provides for

(Testimony of Frederick C. Messenger.)

checks to be taken for collection in the remittance account and this agreement altogether form an agreement between the bank and its customer.

Mr. Erskine: The checks involved, the ones marked here for identification, were not accompanied by deposit tags in the form of the exhibit just introduced in evidence?

Mr. Lasky: No, I have not suggested that they were.

The Court: Then what is the materiality of the deposit slip if there were not used in connection with these? [144]

Mr. Lasky: If your Honor please, perhaps we can clarify it with the witness.

Q. How many accounts did you have with the United Produce Company?

A. We had one account.

Mr. Erskine: I object to that as calling for a conclusion of the witness and I ask that the answer go out, because I really did not have time to object.

The Court: The answer may be stricken to permit an objection.

Mr. Erskine: It is really an interpretation which the witness is placing upon the relationship between the United Produce Company and the bank.

The Court: I understand your position, I think, Mr. Erskine, but sometimes you have to hear things in order to explain the facts. You can, of course, examine him with reference to the facts to show that there were more than one account. While you

(Testimony of Frederick C. Messenger.)

say that is a conclusion of the witness, on the other hand it is an ultimate fact that he is just stating, so your objection is overruled at this point. Proceed.

Q. (By Mr. Lasky): Now, Mr. Messenger, in how many different ledgers were the transactions—

The Court: The answer was stricken to permit the objection.

Mr. Lasky: May the answer be restored to the record? [145]

The Court: Yes.

Mr. Erskine: Very well, your Honor.

Q. (By Mr. Lasky): In how many different ledgers or records were the transactions in the account with United Produce recorded or reflected?

A. Four.

Q. Will you state what those were?

A. The checking account ledger, the drafts discounted liability ledger, the notes discounted liability ledger, and the assigned accounts ledger.

Q. What papers would have to be consulted at any particular time, or would you consult at any particular time as auditor to determine the true balance, if any, of United Produce account at any particular date?

Mr. Erskine: Again I object to that, if your Honor please. I suppose it is subject to the same comment that I can try to elucidate it upon cross-examination, but I think it calls for the conclusion of the witness in a material respect. The witness

(Testimony of Frederick C. Messenger.)

can state what accounts were kept, what they were, and then they can be evidenced. But he cannot state, it seems to me, that in determining the balance of credit of the United Produce in the commercial account that he, under the auditing practice of the bank had a right to look at the drafts, discount ledger, the assigned accounts ledger and the note ledger. I do not believe that is a proper conclusion and I do not think [146] the witness should state it.

The Court: I think you just have a controversy with reference to the facts here, Mr. Erskine. I do not see that there is an objection to the witness being able to testify as to what he did do. That is what he is testifying to. As to what records he consulted in order to determine the balance of the account.

Mr. Erskine: The balance to what account? The commercial account?

The Court: He says there is just one account. That is what he says.

Mr. Erskine: That is what he says.

The Court: You can develop that fully. The objection is overruled.

Q. (By Mr. Lasky): Will you state then what papers you, as an auditor, consulted to determine the true balance in the United Produce Account on any particular date?

A. I would have to refer to the four ledgers I just covered, and in addition the deposit tickets supporting deposit entries on the commercial ac-

(Testimony of Frederick C. Messenger.)

count, and the remittance sheets supporting the payments received on the assigned account.

Q. Could I ask you another question? First, before doing that, you are acquainted with this, Mr. Erskine. It was marked in Chicago. Will you stipulate that that is the signature card of the United Produce Company? [147]

Mr. Erskine: Yes.

Mr. Lasky: With the Merchandise National Bank. And I will ask that this be marked and offered into evidence because of the passage there that will make the connection with that deposit slip.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 8.)

The Court: There is no objection, Mr. Erskine?

Mr. Erskine: No, sir.

The Court: Very well. Then it is so admitted.

Mr. Lasky: If the Court please, the signature card of Merchandise National Bank of Chicago, Chicago, Illinois, reads:

"The undersigned duly authorized to act in the premises for and in the name of the organization hereby accept and agree that it shall henceforth be bound by the agreements recited in all deposit books now or hereafter furnished by your bank for this account and as well all bank rules and regulations governing both the account and the handling of items of it as fully

(Testimony of Frederick C. Messenger.)

as if the same was set forth verbatim herein and executed in the organization's name and behalf."

This is signed by Mr. Rosenthal and Mr. Oddo of the United Produce Company.

Q. Now, Mr. Messenger, we looked in Chicago, you will remember, Mr. Erskine, we looked in Chicago for a copy of the deposit book [148] which was in use at the time in November, 1948, and we couldn't find it.

Mr. Erskine: We couldn't find it. I asked for it and they couldn't find it.

Mr. Lasky: Correct.

Q. Were you able to find the book that was current at that time in November, 1948?

A. No, we have not.

Q. Do you recall whether or not the agreement which appears on the back of the deposit tag which has been marked here as Plaintiff's No. 7 is the agreement printed in the deposit book which was used at that time? A. Yes, that was a fact.

Mr. Lasky: I think, if the Court please, that makes the connection of tying in that deposit book with all the transactions of the United Produce Company.

Q. Now, Mr. Messenger, I will ask you this question: You have referred to conditional credits which were entered on the basis of these checks which came back from the Bank of America and which were on your list when you talked to Mr.

(Testimony of Frederick C. Messenger.)

Etribou. Deducting those conditional credits entered on the basis of those checks from the United Produce account, was there any apparent credit on the books against which to pay the \$113,216.50 on November 15, 1948, or thereafter?

Mr. Erskine: Just a second. I object to that as incompetent, [149] irrelevant and immaterial. I make the objection more for the record to make my point. I won't read any authorities. I have them here. The evidence is really being offered for the purpose of showing there was no credit balance against which these checks were paid.

Mr. Lasky: No true credit balance.

Mr. Erskine: Therefore the checks were paid or entered as debits by mistake, and that for some reason or other the Bank of America is bound by the mistake made by the Merchandise Bank. We take the position that under the law the fact that the Merchandise Bank may have paid the checks by mistake when there was no credit balance to the credit of the United Produce Company does not make any difference whatever. We take the position that under the law in commercial transactions of this sort the bank is bound by the payment, subject perhaps to the agreement stated here that it has the right to reverse the entry within one day after the payment, but that after that time it is bound, and therefore this evidence that is now being offered is incompetent, irrelevant and immaterial because it relates to the subject I have just stated, and the law is what I have just stated.

(Testimony of Frederick C. Messenger.)

The Court: Very well. I will reserve my ruling upon the objection and, Mr. Erskine, you will submit a short memorandum with reference to that. At the conclusion of the whole case when you submit your memorandum, you can argue this [150] point.

Mr. Erskine: All right.

Mr. Lasky: Perhaps this goes to the legal argument which may turn this case one way or the other.

The Court: Yes.

Mr. Lasky: Will you answer the question, please?

Q. If you deduct the conditional credits which have been entered to the United Produce Company account on the basis of the checks referred to, you deduct that, did the United Produce account have any apparent credit on the books on November 15, 1948, or thereafter against which to pay the \$113,216.50?

Mr. Erskine: Just a second. It will be understood the objection goes to that question?

The Court: The objection goes. It is all admitted subject to your objection, and the Court reserves its ruling and you can argue the matter.

Mr. Erskine: All questions along this line.

The Court: Your record will be saved. This whole matter, anything that you contend is immaterial you may argue to me at any later time and I will recognize it as having come under your objections.

The Witness: The answer is "No."

(Testimony of Frederick C. Messenger.)

Q. (By Mr. Lasky): Did the United Produce Company on November 15th, 1948, and thereafter have any funds in the Merchandise National Bank out of which to pay the six checks for [151] \$113,216.50? A. No.

Q. What was the state of the United Produce's account with Merchandise National Bank on November 15th and thereafter?

A. Very much overdrawn.

Q. How much? I do not mean to exact dollars and cents, but what is the general magnitude of it? In excess of what?

A. In excess of a half million dollars.

Mr. Lasky: I think all other questions I intended to ask Mr. Messenger have been covered by stipulation; so I turn him over to you, Mr. Erskine, for cross-examination.

The Court: Shall we take the recess? The Court will take a recess until five minutes after three.

(Recess.) [152]

#### Cross-Examination

By Mr. Erskine:

Q. Mr. Messenger, prior to your conversation with Mr. Etribou, as I understood your direct testimony, you had learned that the Merchandise Bank was taking a loss in its transactions with the United Produce Company? A. Yes, I did.

Q. And then in the afternoon of November 17

(Testimony of Frederick C. Messenger.)

you called up the East Bakersfield branch of the Bank of America and talked to Mr. Etribou?

A. That is right.

Q. And then I understood you to say that you told Etribou that the United Produce Company had you over a barrel and perpetrated a fraud upon you—that is, your bank—and that you wanted to talk to him about the account of Lofendo with the East Bakersfield branch; that is correct, substantially, isn't it?

A. I wanted to talk to him about checks that had been drawn against the Lofendo account.

Q. Then you had a list of the checks that had been received by your bank and you started to read off that list to Mr. Etribou?

A. That is correct.

Q. And then he told you that he thought it would be better for him to read off the checks from the account of Lofendo at his bank that had been paid so that you could check off those checks against his list? A. That is correct.

Q. I think that you also testified that those checks that you [153] read off to Mr. Etribou, or rather the checks that you had on that list, were not checks that had been deposited to the credit of the United Produce Company in your bank but had been received by your discount department as the checks of debtors owing accounts receivable assigned to your bank? A. That is correct.

Q. And the checks that you had on your list are those included in Exhibit 11?

(Testimony of Frederick C. Messenger.)

A. That is right.

Q. Are those all the checks that were on your list?

A. I didn't foot up these particular checks to see whether or not they are all; I assume that they are.

Q. You assume that they are all of them?

Mr. Lasky: Pardon me. All that were on the list after he checked off the items that Mr. Etribou called off, is that what you refer to?

Mr. Erskine: Yes, all the unpaid checks. Are these all the unpaid checks?

Mr. Lasky: As I understand it, yes.

Q. (By Mr. Erskine): I understand on the back of these checks, Mr. Messenger, there is an endorsement, "Pay to the order of the Merchandise National Bank, United Produce Company"; it is a stamp endorsement. That was the regular endorsement of the United Produce Company?

A. I believe that stamp has "Special Account" on that endorsement. [154]

Q. "Special Account," yes.

A. That is the fact, yes.

Q. And all of the checks that the United Produce Company delivered to you with remittance sheets, that is checks of debtors owing the United Produce Company accounts receivable had a similar endorsement on them? A. That is right.

Q. Now Etribou read off to you the checks that his branch had paid against the Lofendo account commencing back on November 4?

(Testimony of Frederick C. Messenger.)

A. November 1.

Q. November 1.

Mr. Erskine: I believe it was stated this morning, Mr. Lasky, in our conversation in the Judge's chambers when we were discussing our stipulation, that the commercial ledger sheets of the Lofendo account could be received in evidence provided they went back some time beginning in September or October.

Mr. Lasky: Oh, yes, I have no objection. If you tell me that these do go back to that time, it is all right.

Mr. Erskine: I would like to have these marked, your Honor.

The Clerk: Defendant's Exhibit C for identification.

Mr. Erskine: I would like to offer it in evidence.

The Court: No objection?

Mr. Lasky: There is no objection.

The Court: It may be so admitted.

The Clerk: Defendant's Exhibit C in [155] evidence.

Q. (By Mr. Erskine): You say that Mr. Etribou went back to the first day of November in order to read off to you the checks which his branch had paid?

A. Mr. Etribou told me that he would read off all checks paid by the East Bakersfield branch from and including November 1 and on.

Q. Were those checks which he read off to you few in number or rather numerous?

(Testimony of Frederick C. Messenger.)

Q. He called off a number of them; just how many I couldn't say.

Q. There were well in excess of 20 checks, that he called off?

A. There might have been, because there was a number of checks that he called off that were not on my list.

Q. And your best recollection is that there might have been as many as 20 checks that he called off as checks that his bank had paid, that is, Lofendo checks drawn on his bank since November 1; is that right? A. I couldn't say, Mr. Erskine.

Q. But your present recollection is that they were numerous?

A. There were quite a number of checks called off.

Q. When Mr. Etribou was calling off those checks to you he told you that he had the account of Lofendo with the branch before him and that he was reading what he was calling off to you from the account, didn't he?

A. He told me that he had the record of the Lofendo account before him and he was reading from that. [156]

Q. Did he tell you at that time that he was not, or rather, did he read to you not only the debits to the account but the credits?

A. He read off the debits.

Q. And there was no reference to any credits to Lofendo in what Mr. Etribou told you in that conversation?

(Testimony of Frederick C. Messenger.)

A. There was no reference to credits and amounts of credits that he made during that conversation.

Q. But he did tell you that as of the close of business on November 17 there was a balance to the credit of Lofendo of \$699?

A. He volunteered that information.

Q. He told you that? A. Yes.

Q. And he also told you that his branch had been paying only against collected funds?

A. He made the statement that "We have not been paying against uncollected funds for some time."

Q. And he told you that his branch was in the clear? A. Yes, he did.

Q. And when he said that to you, you understood him to mean, did you not, Mr. Messenger, that all the debits that had been entered against the account were entered against collected funds?

A. There was no discussion of that whatsoever.

Q. I am asking you what you understood him to mean when he told you that his branch was in the clear? [157] A. He meant—

Q. Is that what you understood him to mean?

A. That at that particular time he had not paid against uncollected funds and that they had that balance remaining, that was a black balance.

Q. And he told you that the branch was in the clear, did he not? A. Yes, he did.

Q. I am asking you, Mr. Messenger, if you un-

(Testimony of Frederick C. Messenger.)

derstood him to mean by that statement that the branch had been debiting checks against collect funds?

A. That was not discussed; there was no statement about it at that particular time.

Q. I'm not asking you whether or not he told you what he meant by that expression; I am asking you what you understood by the expression. Did you understand that?

A. You mean that he had been paying only against collected funds?

Q. And that therefore his branch was in the clear. That is what you understood, wasn't it?

A. You could assume from his conversation that he was paying—for some time they had been paying only against collected funds.

Q. Now I haven't got an answer to my question yet, Mr. Messenger, and I believe it is material. Mr. Etribou told you in that conversation that he had been paying against collected funds; that his branch had been paying against collected funds, and that the branch was in the clear, and I am asking you what you [158] understood by that expression of Mr. Etribou's, that the branch was in the clear? What did you understand by that, Mr. Messenger?

A. By that I understood that for some time they had not been paying against uncollected funds, and at that particular moment they were in the clear, they had a black balance of \$699.02.

Q. Now in that conversation you asked Mr. Etribou whether he had received an advice of

(Testimony of Frederick C. Messenger.)

credit to the effect that the six checks which are the subject of this litigation had been paid? You asked him that, did you not?

A. I asked him whether he had received—his branch had received the advice of credit.

Q. To the effect that these six checks had been paid? A. That is correct.

Mr. Lasky: Pardon me; is that asking what was said or an interpretation of the meaning of the advice of credit letter?

Mr. Erskine: I am asking him what was said.

A. I asked Mr. Etribou whether or not his branch had received the advice of credit from Merchandise National Bank on their collection of six checks for 113,000 odd dollars.

Mr. Lasky: I move to strike that other statement that dangled at the end of a question about the advice of credit stating that something had been paid.

Mr. Erskine: That may go out.

The Court: Very well; it may be stricken. [159]

Q. (By Mr. Erskine): When you referred to an advice of credit, you referred to this document which has already been introduced in evidence as defendant's exhibit A, did you not?

A. That is correct.

Q. And you asked Mr. Etribou if he received that advice? A. That is correct.

Q. And he replied that he had not?

A. That is right.

Q. Now did I understand you to say, Mr.

(Testimony of Frederick C. Messenger.)

Messenger, that at that time you told Mr. Etribou that the advice of credit had been sent out in error?

A. I did.

Q. Did you explain to him that had been sent out in error because your bank had received checks in its assigned accounts receivable account which had turned out to be not good checks and would therefore have to be charged back? Did you tell him that? A. There was no such discussion.

Q. All that you told him in that connection was that your bank had sent out the advice of credit in error? A. That is right.

Q. And you didn't explain to him in what the error consisted?

A. The only explanation was that the United Produce Company had perpetrated a fraud on the Merchandise National Bank and that the advice of credit had been sent out in error. [160]

Q. Did you tell him that the advice of credit had been sent out in error because the United Produce Company had perpetrated a fraud on the bank?

A. No, sir, I didn't state it that way.

Q. As a matter of fact, the way the conversation took place was that you started the conversation with the statement that the United Produce Company had perpetrated a fraud on the bank; that is right, is it not? A. That is right.

Q. And then you discussed the checks that had been paid and those that had not been paid; that is right, is it not?

(Testimony of Frederick C. Messenger.)

A. I believe that was the order.

Q. And then you came along and you told him that the advice of credit had been sent out in error?

A. That is right.

Q. And you didn't give him any explanation with respect to that particular statement, did you?

A. No, sir.

Q. Now prior to your discussion with Mr. Etribou you knew, did you not, that the six checks had been received at your bank on November 15?

A. Yes, sir.

Q. And you knew that the six checks had been debited—that is, you knew prior to your conversation with Mr. Etribou that the six checks had been debited against the account of United [161] Produce Company? A. Yes.

Q. And you knew prior to that time that the account between the Bank of America and the Merchandise Bank kept by the Merchandise Bank had been credited with the amount of the six checks? A. On our books, yes, sir.

Q. Yes, on your books. And you knew that the six checks had been stamped "Paid" and had been filed with the cancelled checks of the United Produce Company? A. Yes.

Q. And you knew all that prior to your conversation with Mr. Etribou, didn't you?

A. Yes.

Q. And you knew, of course, in addition to that, that the advice of credit had been sent out on November 15? A. Yes.

(Testimony of Frederick C. Messenger.)

Q. Now I believe you stated that Mr. Etribou said that he would do what he could to help you out, the Merchandise Bank, and that he would either enter the credit and charge checks against it, or that he would not make entry of it, is that right?

A. That is correct.

Q. And did Mr. Etribou at that time say to you that he couldn't refuse to enter that credit?

A. He did not, sir.

Q. He didn't say anything along that line? [162]

A. No, sir, he did not.

Q. But at that time, at the time you had your conversation with Mr. Etribou, you knew that the six checks had been debited against the account and that the Bank of America had been credited with the amount of the six checks; that is right, isn't it?

A. Yes.

Q. And you have testified to your experience as a banker here in answer to questions put to you by Mr. Lasky. You have testified, haven't you?

A. What testimony?

Q. You have testified with respect—

Mr. Lasky: The record will speak for itself as to what he testified to.

Q. (By Mr. Erskine): Let me withdraw that question and put it this way: You have had long experience as a banker, have you not, Mr. Messenger? A. Yes, sir.

Q. Now when you were discussing this matter with Mr. Etribou of whether or not the Bank of America was to enter the credit, was there any

(Testimony of Frederick C. Messenger.)

doubt in your mind with respect to the right of the Bank of America to refuse to enter that credit?

A. No, sir.

Q. You believed clearly and definitely at that time, upon your own experience as a banker, that the Bank of America at that [163] particular point, on November 17, did have the right to refuse to enter that credit, did you? A. Yes, sir.

Q. On what did you base that belief, Mr. Messenger?

Mr. Lasky: If the Court please, he has asked for the man's understanding. Now he wants him to give his opinion why he so believed it. That almost calls for a legal argument.

The Court: No, I think he has given his opinion; now he is asking him to explain upon what his opinion is based. There has been no objection to the opinion given. Now of course he is entitled to know upon what he bases that opinion.

Mr. Lasky: I will withdraw my objection.

A. The Bank of America had not yet received the advice of credit, had not acted upon the advice of credit.

Q. (By Mr. Erskine): Those were the grounds upon which you based your opinion that the Bank of America did have the right at that juncture, on November 17, to refuse to enter the credit; is that right? A. Yes, sir.

Q. Now, Mr. Messenger, when did you first discuss that legal principle that the Bank of America had the right to rescind the credit because it had

(Testimony of Frederick C. Messenger.)

not acted upon it? When did you first discuss that legal principle with anyone? Did you discuss it before or after your conversation with Etribou?

Mr. Lasky: Now I object to that as being utterly immaterial, [164] whether he ever discussed it or when he discussed it.

The Court: Yes, I don't see, counsel—in other words, this witness' opinion as to what the legal rights of one party or the other was under the circumstances is not binding on anyone. It is a matter that the Court is going to have to determine, as to whether or not—

Mr. Erskine: I believe, your Honor, that it is proper cross-examination. We believe that it is proper cross-examination for this reason: This man says that he has been a banker of long experience; he believed that the Bank of America had the right on November 17, after the checks had been debited to the account of the United and after the Bank of America had been credited, after these other events had taken place, that they had a right to rescind the credit.

The Court: What difference does it make whether he believed it or did not believe so far as this Court is concerned? I am going to have to decide that problem.

Mr. Erskine: Yes; but if, as a matter of fact, he did not believe that, if he believed, upon the basis of his experience as a banker, that when the checks had been debited to the United Produce account and the Bank of America account had been credited, that

(Testimony of Frederick C. Messenger.)

then a relationship of debtor and creditor was created between the Merchandise Bank and the Bank of America and a relationship of debtor and creditor had been created between the Bank of America and Lofendo—if he believed that [165] at that time, then it certainly casts doubt upon his story that Etribou told him, “All right, we will rescind the credit.” That is the purpose of the examination.

The Court: Very well; you may proceed upon that basis. You will be permitted to examine for that purpose.

Mr. Erskine: That is the purpose.

Mr. Lasky: Now what is the last question?

Mr. Erskine: I will withdraw the last question.

Q. When did you first discuss this legal principle, Mr. Messenger, with anyone?

Mr. Lasky: Without repeating it, my objection goes to this line of questioning?

The Court: Yes.

Mr. Erskine: That the Bank of America had the right to revoke this credit because it had not acted upon it. When did you first discuss that, Mr. Messenger?

A. There wasn't any question of a discussion of the Bank of America revoking the credit. We were rescinding the credit and asking the Bank of America not to act upon it, when they received it to return it to one of our officers when he arrived the following day.

Q. When did you first discuss the legal principle

(Testimony of Frederick C. Messenger.)

with anybody that as the advice of credit had not been received, you had a right to rescind the credit and the Bank of America had the right to agree that the credit should be rescinded? When did [166] you first discuss that legal principle with anybody?

Mr. Lasky: If he did discuss it. The question assumes something not established that he did discuss it.

The Court: Yes.

A. I should say prior to the conversation with Mr. Etribou that matter was discussed.

Q. (By Mr. Erskine): With whom?

A. Mr. Riordan, our general counsel.

Q. That very point was discussed, was it?

A. Yes, sir.

Q. And Mr. Riordan gave you his opinion that the advice of credit could be revoked by your bank because it had not arrived at the East Bakersfield branch, is that right?

A. The opinion was that if—as I recall it, if the advice of credit had not been received by the Bank of America, we would rescind our credit.

Q. That is what Riordan told you: If the advice of credit had not been received by the Bank of America you could rescind the advice, is that right?

A. That is correct.

Q. Did you know when you called up Mr. Etribou whether or not that advice had been received by the Bank of America?

A. No, sir, I did not.

(Testimony of Frederick C. Messenger.)

Q. As a matter of fact, it had been mailed on November 15, hadn't it? [167]

A. That is right.

Q. It had been mailed according to your belief not knowledge—according to your belief it had been mailed to the East Bakersfield branch; that is right, isn't it? A. I believe so.

Q. And that is why you asked Mr. Etribou whether or not he had received it, because you thought it had been mailed there?

A. That is right.

Q. The conversation between you and Mr. Etribou took place rather late in the afternoon of November 17, didn't it?

A. 4:17 Chicago time was the starting of the conversation.

Q. What is your experience, Mr. Messenger, with respect to the mails from Chicago to a place like East Bakersfield?

Mr. Lasky: Well now—

Q. (By Mr. Erskine): In your experience would an advice of credit mailed on November 15 be received at the East Bakersfield branch on the second succeeding day after it was mailed?

Mr. Lasky: Now I object to that; what his belief was about the course of mails is immaterial. He said he didn't know whether the advice was received, he telephoned to find out, and if he learned something he would act accordingly.

The Court: The objection is sustained.

Q. (By Mr. Erskine): Now as I understood

(Testimony of Frederick C. Messenger.)

you, Mr. Messenger, you told Mr. Etribou that Mr. LeRoy was taking the plane that night for California? [168] A. That is correct.

Q. And that he was going down to Bakersfield?

A. That is right.

Q. I believe you stated that Mr. Etribou said that he would go out to the airport and meet Mr. LeRoy? A. That is right. [168A]

Q. Now, isn't it a fact, Mr. Messenger, that what Mr. Etribou told you was that he could not refuse to enter the credit but that if you gave to Mr. LeRoy checks drawn by Lofendo against the account, he would do what he could to give the Merchandise Bank priority in charging those checks against the credit?

A. There was no such conversation whatsoever.

Q. I believe, however, that you testified that Mr. Etribou said that he would either enter the credit and charge checks against it or not enter the credit, as you wanted it?

A. He did say that at the very beginning.

Q. But he did not say to you, according to your testimony, what I am stating?

A. No, he did not.

Q. That is, that he could not refuse to enter the credit, but that if you sent out with Mr. LeRoy checks of Lofendo drawn against the account, he would do what he could to give the Merchandise Bank preference in charging those checks against the credit? A. No.

Q. He did not say that?

(Testimony of Frederick C. Messenger.)

A. Mr. Etribou did not.

Q. Isn't it a fact that Mr. Etribou told you that he would do everything possible to help you out in your problem, and that he would discuss the matter with LeRoy when LeRoy alighted in Bakersfield. [169] A. He did not.

Mr. Erskine: Let me have that statement, will you?

Mr. Lasky: What statement?

The Court: The memorandum?

Mr. Lasky: It has been marked for identification.

The Court: It has been marked for identification but not introduced.

Q. (By Mr. Erskine): Mr. Messenger, you have just stated that Mr. Etribou did not tell you that he would do everything possible to help you out in your problem, and would be glad to discuss the matter with Mr. LeRoy when he arrived, but I will call your attention, Mr. Messenger, to your memorandum, the second page of it, which reads as follows:

“Mr. Etribou stated that he would do everything possible to help us in our problem and would be glad to discuss the matter with Mr. LeRoy when he arrived.”

A. I do not understand you said it just exactly that way.

Q. Let us read it. Your answer was pretty definite and clear. Read what he said.

(Testimony of Frederick C. Messenger.)

(The reporter read as follows.)

“Q. Isn’t it a fact that Mr. Etribou told you that he would do everything possible to help you out in your problem and that he would discuss the matter with LeRoy when LeRoy arrived in Bakersfield?

“A. He did not.” [170]

Q. (By Mr. Erskine): Wherein does that statement of mine differ from your memoranda, which reads,

“Mr. Etribou said he would do everything possible to help us in our problem and would be glad to discuss the matter with LeRoy when he arrived.”

Wherein is the difference?

A. That does not differ.

Mr. Lasky: I request that he see both sheets of that memorandum.

Mr. Erskine: You can show him both sheets later.

The Court: It is not necessary; counsel is cross-examining him, and if he wants to show him any particular part he may do so.

Mr. Lasky: Very well.

Q. (By Mr. Erskine): And so your statement that Etribou did not tell you that is incorrect?

A. My answer to your previous statement is incorrect, yes.

Q. Mr. Messenger, had you ever talked with Mr. Etribou on any occasion prior to this occasion on November 17th? A. No, I had not.

(Testimony of Frederick C. Messenger.)

Q. Did you ever know Mr. Etribou prior to that time? A. No, I did not.

Q. Did you ever have any contact with the East Bakersfield branch of the Bank of America prior to that time?

A. Not that I could recall. [171]

Q. And you had had no transactions of any sort with that branch of the Bank of America prior to that time? A. Personally I had not.

Q. Had you personally ever had any transactions with the Bank of America at any branch, at any office, prior to that time?

A. Yes, I have had.

Q. But you had had none with Etribou or the East Bakersfield branch?

A. Not that I recall.

Q. Prior to your conversation with Mr. Etribou did you have a conversation with Mr. LeRoy in which Mr. LeRoy was asked whether or not he would go out to California in connection with this matter, and in which Mr. LeRoy stated that he was willing to go? A. Yes, I did have.

Q. As a matter of fact, when you were talking with Etribou Mr. LeRoy was sitting by your side at the telephone, was he not?

A. He was, yes.

Q. Is it a correct statement, Mr. Messenger, to say that after your conversation with Mr. Etribou you had another talk with Mr. LeRoy, in which you suggested to Mr. LeRoy that when he got out to California he try to pick up the advice of credit?

(Testimony of Frederick C. Messenger.)

Mr. Lasky: Just a moment. I do not believe this is proper cross-examination with respect to conversations with LeRoy. The witness has testified to the one with Mr. Etribou. [172]

The Court: It does not seem to be within the direct examination.

Mr. Erskine: The purpose will be disclosed directly, your Honor. I think it is proper cross-examination and it is preliminary in nature.

The Court: What is the purpose?

Mr. Erskine: I would rather not disclose it, your Honor please. I was just coming to the purpose.

The Court: I will reserve ruling on the objection. Proceed.

(Question read.)

A. In discussions with Mr. LeRoy after the Etribou conversation, one of the instructions that was given to him was to pick up the advice of credit.

Q. And your understanding in the afternoon of November 17th, after your telephone conversation with Mr. Etribou, was that Mr. LeRoy, when he got out to California, was to pick up the advice of credit, was that right.

Mr. Lasky: I object to that because it is not proper cross-examination, and this preliminary questioning seems to be leading to nowhere.

The Court: I will reserve ruling on the matter. Answer the question.

(Question read.)

(Testimony of Frederick C. Messenger.)

A. Yes.

Q. (By Mr. Erskine): Mr. Messenger, I will ask you this: [173] What was your understanding and state of mind on the afternoon of November 17th, as to whether or not the Bank of America would surrender the advice of credit to you without first having received the six checks which were then in your possession?

Mr. Lasky. If your Honor please, I object to the man's understanding or state of mind as irrelevant. The conversation occurred and the Court will have to decide whether from that conversation the Bank of America should or should not have done so. What the witness believed they should do would be immaterial.

The Court: That is my view of the matter, counsel.

Mr. Erskine: I think if your Honor please, the understanding of this witness with respect to that point is most material. He has testified that he rescinded the credit, and that Etribou said, "All right, I will rescind the credit." He has testified just now that LeRoy was told to pick up the advice of credit. Now, it is very material to find out whether or not, in my opinion, testing the credibility of his story, to find out whether or not LeRoy took with him, that is, with LeRoy when he went to California, the six checks for the purpose of getting the advice of credit.

Mr. Lasky: We have stipulated—

Mr. Erskine: Wait a minute. This is cross-

(Testimony of Frederick C. Messenger.)

examination. If this witness had an understanding, if it was his state of [174] mind on November 17th that the Bank of America, according to the practice of banks, would not surrender the advice of credit unless it got the six checks, which after all were the checks of its deposit—if that was the state of mind, and he did not give the six checks to LeRoy to take with him to California, it in my opinion casts doubt upon his testimony.

Mr. Lasky: I would like to reply to that. We agreed to stipulate this morning that the six checks were mailed back on the 19th directly to the East Bakersfield branch. Now, if there is some kind of practice whereby one bank will not give up an advice of credit without the checks being sent back, and if he wants to offer evidence on that, that is another thing. But to ask the witness for his understanding is immaterial.

The Court: Yes, I do not understand it, counsel. The facts are there, and the Court can then test the credibility of the witness from the admitted facts and the facts that did take place. Now, as to what his own individual opinion on the matter or state of mind was, I can't follow your attack. I will sustain the objection at this time.

Q. (By Mr. Erskine): Mr. Messenger, those six checks were in the hands of the bank on the afternoon of November 17th, were they not?

A. In the hands of the Merchandise National Bank, yes.

(Testimony of Frederick C. Messenger.)

Q. Did you deliver them to Mr. LeRoy before Mr. LeRoy left for California? [175]

A. No, I did not.

Q. As a matter of fact, you did not send those six checks out to California until you wrote your letter of November 20th, I believe it is?

I would like to have this letter marked for identification.

(The letter referred to was thereupon marked Defendant's Exhibit D.)

Mr. Lasky: We stipulated this morning that letter can go in, so if you want to offer it—

Mr. Erskine: Yes, I would like to offer it in evidence.

The Court: Very well; it may be admitted.

(Defendant's Exhibit D for identification was thereupon received in evidence.)

Q. (By Mr. Erskine): Referring you to your letter of November 19th, Mr. Messenger, which has just been introduced in evidence, that letter returned the six checks to the Bank of America, did it not? A. Yes, sir, it did.

Q. This letter states,

"The return of these checks was agreed upon by your head office in San Francisco, with Mr. A. L. LeRoy, our vice president, on Thursday, November 18, 1948, thereby cancelling our advice of payment which had been forwarded to you in error."

That is correct, is it not? [176]

(Testimony of Frederick C. Messenger.)

A. Yes, sir.

Q. This letter bears your signature, does it not?

A. Yes, sir.

Q. You did not refer in this letter to your conversation with Mr. Etribou, did you?

A. I don't remember.

Mr. Lasky: The letter will speak for itself.

Mr. Erskine: I am asking the witness. This is cross-examination.

The Witness: No, sir, I did not.

Q. (By Mr. Erskine): Evidently when you wrote this letter you believed, did you not, Mr. Messenger, that if the advice of credit had been rescinded, the six checks should be returned to the Bank of America? A. Yes, sir.

Q. With respect to your memorandum that has been marked for identification in this case—it has not been admitted in evidence—marked for identification as Plaintiff's Exhibits 3-A and 3-B, you dictated that shortly after your conversation with Mr. Etribou, did you not? A. Yes, sir.

Q. Is the answer "Yes"? A. Yes.

Q. And it was transcribed immediately?

A. Yes, sir. [177]

Q. And you had it in your hands completely transcribed by what hour in the afternoon, according to your best recollection? A. Maybe 5:30.

Q. And you saw Mr. LeRoy after that hour, did you not? A. I did.

Q. You had several talks with Mr. LeRoy after that hour? A. I did.

(Testimony of Frederick C. Messenger.)

Q. Did you deliver a copy of that memorandum to Mr. LeRoy so he could take it with him to California? A. No, I did not.

Mr. Erskine: I am reaching another subject. It will take me a little while. I guess I had better keep going.

The Court: I think you had better keep going for a while.

Mr. Erskine: Time is of the essence.

Q. Mr. Messenger, you had a telephone conversation with Mr. LeRoy when Mr. LeRoy was in San Francisco on November 18th, did you not?

A. I did.

Mr. Lasky: Not proper cross-examination, outside the scope of the direct.

Mr. Erskine: I think that that might be proper examination. I do not know whether that is correct or not. You see, your Honor, the witness has stated that Etribou did not refer to any of the credits in this account on the Lofendo account, and it is our position in this matter that on November 15th the East [178] Bakersfield branch gave him immediate credit for the \$97,000 in checks. Those checks were rejected by the Merchandise Bank at 1:30 p.m. Chicago time on November 18th. Later that afternoon, I might say, the checks were rejected by the witness. The witness gave the instructions that the checks be rejected; that on that afternoon LeRoy, from Duncan's office where they had been discussing the revocation of the credit, and where LeRoy, according to our contention, was telling Duncan and

(Testimony of Frederick C. Messenger.)

Johnson that the advice of credit was sent out by error, and where they had communicated with Etribou and Etribou had told them that they were in the clear, that his branch was in the clear, that we will show or attempt to show that this witness had this conversation with LeRoy after he had rejected the \$97,000 in checks, and that he did not communicate that fact to LeRoy, so that LeRoy could communicate it to the men in the Bank of America with whom he was dealing, and that that in our opinion is not dealing in a proper way.

The Court: It may be admissible later under your theory, but it is not proper cross-examination at this point. The objection is sustained.

Mr. Erskine: Then I come to this situation: I do not know, your Honor, how long these gentlemen want to remain in San Francisco.

Mr. Lasky: Until the end of the trial.

The Court: This is a lovely city. There is not reason [179] why they shouldn't enjoy the benefits of San Francisco.

Mr. Erskine: I want the opportunity, and I so advise the Court, at some stage of the proceeding to recall this witness to cross-examine him on Rule 43(b).

Mr. Lasky: He will be present at all times subject to your call and the direction of the Court.

Mr. Erskine: And the same goes for Mr. LeRoy. I want him here all the time.

Mr. Lasky: The same understanding with respect to the men whom you control.

(Testimony of Frederick C. Messenger.)

Mr. Erskine: You can have them here whenever you want. I have been looking over my notes. I think this is proper cross-examination, but I hesitate to reveal the reason for my thought because I do not want to disclose it to the witness.

The Court: It does not immediately appear to me to be proper cross-examination and so I have sustained the objection, but you are not going to be prejudiced by it because you can call the party under Rule 43(b), at any event, at a later point in putting on your defense.

Mr. Erskine: Now, where are the six checks? Have they been introduced in evidence?

Mr. Lasky: I do not think they have been introduced.

The Court: We will mark them in evidence.

Mr. Lasky: Under this procedure they are getting defendant's numbers instead of [180] plaintiff's.

Mr. Lasky: So far as I can see that does not create any prejudice.

The Court: I think they may go in as a group.

Mr. Erskine: I think so, yes.

(The checks referred to were thereupon received in evidence and marked Defendant's Exhibit E.)

Q. (By Mr. Erskine): Calling your attention to these six checks that have been marked as a group "Defendant's Exhibit E," I will ask you, Mr. Messenger, if that is your signature on the back of each one of these checks?

(Testimony of Frederick C. Messenger.)

Mr. Lasky: I will stipulate to that.

A. Yes, it is.

Q. (By Mr. Erskine): Did you cause that notation to be made above your signature? "Cancelled in error"? A. I did.

Mr. Erskine: It is perfectly proper that this go in, but I do make the representation to the Court we are now taking time up on the examination of the witness concerning things that we are stipulating to.

The Court: I think so. I think that is all stipulated to.

Mr. Erskine: It is just preliminary, your Honor.

Q. Now, isn't it a fact, Mr. Messenger, the reason you marked those six checks in that way was that, by reason of your agreement with Etribou, the checks were not going to be paid, [181] and so the only way to eliminate them was to state that they had been cancelled in error?

A. The six checks, the credit—

Q. Just a second; I would like to have you answer that question yes or no. Is that or is it not correct? Then you can explain your answer.

Mr. Lasky: May I make the objection that the question is ambiguous?

The Court: It may be to you. I do not know that it is to the witness.

Mr. Lasky: What is he referring to in the expression "to eliminate them"?

Mr. Erskine: The checks.

The Court: Do you understand the question?

A. Not now.

(Testimony of Frederick C. Messenger.)

(Question read.)

A. I couldn't answer that question.

Q. (By Mr. Erskine): What is that?

A. I couldn't answer that question the way it is put there. [182]

Mr. Lasky: What page?

Mr. Erskine: Page 231.

Mr. Lasky: Can you wait until I get my copy, if you don't mind?

Mr. Erskine: Look at this while I read.

Q. I will ask you if you didn't give the following testimony when your deposition was taken in Chicago in December of last year:

“Q. What was your reason, Mr. Messenger, for your placing on Defendant's Exhibits 3A to 3F, both inclusive, for identification”——

It will be stipulated, I take it, that those were the six checks?

Mr. Lasky: The six checks.

Mr. Erskine (Reading):

“The endorsement: ‘cancelled in error, F. C. Messenger, Merchandise National Bank’?

“A. The reason they were marked ‘cancelled in error’ was the fact that by agreement with Mr. Etribou the checks were not going to be paid and the entry would not be entered on those checks, so that the only way you can eliminate a cancellation is by indicating on them ‘cancelled in error.’ ”

(Testimony of Frederick C. Messenger.)

Did you give that testimony? A. Yes, I did.

Q. Was that the reason why you made that entry "cancelled in error"? [183]

A. The "cancelled in error" was to eliminate the perforation that appeared through the check.

Q. And you have stated here the reason that they were marked "cancelled in error" was the fact that "by agreement with Mr. Etribou the checks were not going to be paid." Was that the reason?

A. Yes.

Q. Then your reason for marking them "cancelled in error" was not that they had been charged against fictitious credits; is that right, or is that another reason?

A. The checks had been entered on this particular account, the United Produce account. They were not being paid, and the memorandum of "cancelled in error" was put on the back to cancel the record of a charge against the account.

Q. And the reason for that, that they were marked that way, or to put it in your own words: "The reason they were marked 'cancelled in error' was the fact that by agreement with Mr. Etribou the checks were not going to be paid"; is that correct?

A. That is right.

Q. I believe you have already testified, Mr. Messenger, that the checks Plaintiff's Exhibit No. 4 for identification, the Lofendo checks, were received as payments on account of assigned accounts receivable?

A. They were received from the United Produce

(Testimony of Frederick C. Messenger.)

Company in purported payments of accounts of debtors to the United Produce [184] Company.

Q. And I think that you have stated that your bank had four ledgers showing its transactions with the United Produce Company—a commercial account ledger, a drafts discounted ledger, a notes discounted ledger, an assigned accounts ledger; that is correct, is it? A. That is correct.

Q. Your bank was discounting drafts in large sums of money for the United Produce Company immediately prior to November 17, was it not?

Mr. Lasky: I object to that as immaterial.

The Court: Overruled.

Mr. Erskine: Would you answer that question?

A. I thought there was an objection.

Mr. Lasky: The Court ruled.

The Court: I ruled you may answer the question.

A. Oh, I beg your pardon. Yes, the bank was discounting drafts for the United Produce Company.

Q. (By Mr. Erskine): On the average the drafts discounted per day exceeded \$200,000, did they not? A. No, sir.

Mr. Lasky: I made the objection very cursorily that it was immaterial. I make it again because I don't see, No. 1, that it has anything to do certainly with the direct examination, and, if it is leading off into the subject of some of the defenses [185] in the case, then it ought to come out as part of the defense and we will meet it at that time.

The Court: What is the purpose of this?

(Testimony of Frederick C. Messenger.)

Mr. Erskine: The purpose relates to his testimony that there was only one account with the bank.

The Court: That is what I understood it to be. On that theory, of course it is proper cross-examination.

Mr. Lasky: Yes, but the amount of drafts discounted, whether they were large or small, would hardly be material to that.

The Court: Oh, it might have some bearing as to whether or not it would be carried as a separate account or just part of the general account, or whatever the system is.

Mr. Lasky: So long as the purpose of the examination now is directed to the testimony about four ledgers, I withdraw my objection.

The Court: Very well.

Mr. Erskine: Would you answer that question, Mr. Messenger?

A. I didn't exactly understand your question. I would like to have that question restated.

(Question read by the Reporter.)

A. No, that was not correct.

Q. What did they average per day?

A. The average drafts discounted per day varied from a few thousand dollars up to maybe ten or fifteen thousand dollars. [186]

Q. I don't mean that; we didn't understand one another. I mean what on the average were the outstanding drafts every day?

A. The average outstanding was different. That

(Testimony of Frederick C. Messenger.)

ran in varying amounts; it might have been \$150,000; it might have been \$250,000. I don't remember the amounts.

Q. And then you had the assigned accounts receivable ledger, did you?

A. That is correct.

Q. And that assigned accounts receivable ledger referred to the ledger showing payments on account of assigned accounts receivable?

A. That is right.

Q. And in addition to that you had a notes discounted ledger, is that right?

A. That is right.

Q. And that notes discounted ledger showed loans made from time to time by the bank to the United Produce Company?

A. That is correct.

Q. And payments received on account of such loans?

A. The actual payments of the notes, yes, sir.

Q. The payments received on account of assigned accounts receivable would be recorded in the assigned accounts receivable ledger?

A. That is right.

Q. Not in the notes ledger? [187]

A. That is right.

Q. Did you, or to your knowledge did any officer of the Merchandise Bank, at any time prior to November 17, in order to determine the amount of the credit balance of the United Produce Company in the commercial account, consult the drafts dis-

(Testimony of Frederick C. Messenger.)

counted ledger or any of the other ledgers to which I have referred?

A. I personally did not. I have—

Q. Was it the practice of your bank prior to November 17, when considering the amount of the credit balance to the credit of any customer on the commercial ledger of that customer to consult not only the commercial ledger sheet but also the other ledgers to which I have referred, in the event such customer was carrying on substantially the same sort of business with the bank as the United Produce Company?

Mr. Lasky: That involves the assumption that other customers were carrying accounts like this.

The Court: He just asked what the practice was if there were such transactions, if the bank had a custom in this regard.

Mr. Lasky: Very well.

A. The bank had a practice on accounts where there were borrowing customers, the borrowing customers had a commercial account, that transactions on its commercial account were referred to the officer handling that particular loan account, and that officer handling that loan account should have knowledge of the transactions that take place in those ledgers that are being [188] talked about.

Q. Certainly, that is obvious. You say, Mr. Messenger, that the loaning officer in charge of an account such as this should consider not only the commercial ledger sheet of the account but the other ledgers? A. That is right.

(Testimony of Frederick C. Messenger.)

Q. To which you have referred?

A. That is right.

Q. Is that right? A. That is right.

Q. And he should keep in constant touch with those, should he not? A. Yes, sir.

Q. And he should determine, among other things, how payments were being received, for example, from debtors on account of accounts receivable, is that right?

A. I was not a loaning officer there, and I didn't handle any of those transactions.

Q. But you have been a banking officer for a long while, Mr. Messenger, and you are familiar with banking practice, and it is a fact, is it not, that a loaning officer would keep in touch with the entire account? A. He should.

Q. Or the entire accounts, let us say, in order to uphold my theory? A. They should. [189]

Q. Of the customer; that is right, isn't it?

A. They should.

Q. And among other things, they should observe whether or not the customer is discounting drafts drawn on the same drawee in very large sums of money, is that right? A. That is right.

Q. In other words, the loaning officer would determine whether or not there is any concentration in the drafts of any one drawee; is that correct?

A. That is why the——

Q. I am not asking any reason; I am asking you if that is right?

(Testimony of Frederick C. Messenger.)

Mr. Lasky: Just a moment. I think that the examination has gone beyond the scope of the direct, as to the relationship between the several ledgers and may be getting into one of the defenses.

The Court: I think it is directed to determine whether or not there was one account involved here or more than one.

Mr. Erskine: That is right.

The Court: That is the purpose of the cross-examination.

Mr. Erskine: Well, I have got to be candid; perhaps I have gone a little bit further.

The Court: Of course, you necessarily get into facts concerning the defense; you can't draw a line and say one thing is on one side of it and one is on the other. If the purpose is to question the witness with reference to whether or not one [190] account existed or more than one account, of course that is right and proper cross-examination.

Mr. Erskine: Yes, that is the purpose, but then—

The Court: It may incidentally prove other things.

Mr. Erskine: To be candid, it very probably will.

The Court: The fact that it necessarily may prove other things doesn't make it not proper cross-examination.

Mr. Erskine: Would you read that last question?

(Testimony of Frederick C. Messenger.)

(The Reporter read the last question as follows: "In other words, the loaning officer would determine whether or not there was any concentration in the drafts of any one drawee, is that correct?"

A. They should.

Q. (By Mr. Erskine): And they should determine whether there is any concentration in the assignment of accounts receivable of any one debtor?

A. They should.

Q. And whether or not there is any concentration in the receipt of payments from any one debtor? A. They should.

Q. Now the question that I put to you a while ago was this—and I did not, as far as I know, get a response to it—when a loaning officer, according to the usual practice, usual and ordinary practice of your bank, was determining the credit balance to the credit of a customer against which he could draw [191] checks on his account, was it the practice of the loaning officer or any other officer of your bank to consult any other records than the commercial ledger sheet? A. Yes, they did.

Q. In order to determine the amount of credit balance to the credit of a customer against which he could draw checks? A. Yes.

Q. Now give me an instance when that was done, Mr. Messenger.

A. The officers, on numerous occasions, when the bookkeeping department would present to them

(Testimony of Frederick C. Messenger.)

the work of a day of a particular account, the checks that were being presented for payment that day, the deposit tickets covering deposits, if any, that were made that day,—on more than one occasion have referred to the ledger to ascertain the entire picture of the account before they have made a decision as to what should be done with that account on that day.

Q. As to whether or not checks should be paid against the account? A. Yes, sir.

Q. Now, Mr. Messenger, it is a fact, is it not, that there were in this United Produce account on many occasions prior to November 17th, what is known in the banking world as noonday red balances?

Mr. Lasky: Now, if your Honor please, we are getting outside the field— [192]

Mr. Erskine: No, we are not.

The Court: No, I think it is still going to the same point, and for that purpose it is proper cross-examination. If it incidentally establishes other matters, counsel, that doesn't make it not proper cross-examination.

Mr. Lasky: No; of course I understand that, but it would just seem to me that when we get into the noonday overdrafts, from my remembrance of what he was doing in the deposition, he was getting into one of the defenses. When the time comes I want to make an argument about the relevance of them.

The Court: You may argue its relevance, of course; but if I understand the picture, it is simply

(Testimony of Frederick C. Messenger.)

this: What counsel is trying to develop is that when a man has an account on the bank and draws checks on it, there is a balance due on that account on which he can draw. If you have a loan with the bank at the same time and you owe the bank a thousand dollars and you have \$200 in the checking account, you can draw a check for \$200, but you still owe the bank a thousand dollars on your loan. Is that the point?

Mr. Erskine: That is it.

The Court: And on that basis, a noonday balance might show that you owed the bank \$2,000, but you would have in your checking account a balance of \$1,000 upon which you could draw.

Mr. Lasky: No, because the noonday balances he is talking about are in the checking [193] account.

The Court: That may be, but he can examine along that line.

Mr. Lasky: I think he has got a right to go into whether there is one account or more than one.

The Court: Yes, that is the whole situation.

I think probably, however, we have arrived at a stage of the proceedings where you have to get back to your offices downtown and check out for the week end, or check in to do some work on this case for the week end. It might be that we had better recess at this time.

If you can get me just a case or two with reference to all of your theories that I can check, it

(Testimony of Frederick C. Messenger.)

might help me a lot as we go along in the next few days.

Mr. Lasky: Yes, we will get it in the first of the week. I assume that your Honor wants just the citations without an analysis.

The Court: No analysis. I can see the picture as it is developing now and understand each of your positions, but just give me your memorandum.

Mr. Lasky: I assume when the case is submitted we will have an opportunity——

The Court: To fully argue it and submit all the authorities that you care to.

Mr. Erskine: Just a statement of the issues with a citation of authorities?

The Court: A statement of the issues as you view them and [194] a citation of authorities supporting your view?

Mr. Erskine: No quotation from those authorities?

The Court: No.

Mr. Erskine: Just a citation of them?

The Court: No, just a simple matter.

Mr. Erskine: No argument?

The Court: No argument.

Very well, the Court will stand in recess until ten o'clock Monday morning.

(Thereupon an adjournment was taken until Monday morning, June 19, 1950, at 10:00 a.m.) [195]

June 19, 1950, 10 A.M.

The Clerk: Merchandise National Bank of Chicago vs. Bank of America National Savings and Loan Association, on trial.

Mr. Lasky: If the Court please, in pursuance to your Honor's request for a memorandum that just states the propositions, I present here to the Court such a memo, in rather sketchy form.

Mr. Erskine: I am sorry to say, your Honor, that I haven't mine typewritten yet. It is being typewritten this morning, and I will have it at 2 o'clock.

The Court: Very well.

Mr. Erskine: If you would rather keep it until I get mine in?

Mr. Lasky: No, you may know what my contentions are; I have nothing to conceal.

Mr. Erskine: Mr. Messenger was on the stand.

The Court: Yes, take the stand, Mr. Messenger.

The Clerk: Mr. Messenger has been sworn.

FREDERICK C. MESSENGER  
called as a witness on behalf of the plaintiff, resumed the stand, previously sworn.

Cross-Examination  
(Resumed)

By Mr. Erskine:

Q. Now, Mr. Messenger, I believe that you [196] were testifying under direct examination of Mr. Lasky the other day that the United Produce Company had one account with the Merchandise Bank and that that account was evidenced by different

(Testimony of Frederick C. Messenger.)

ledgers: the checking account ledger, drafts discounted liability ledger, the notes discounted liability ledger, and the assigned accounts ledger. You gave that testimony, did you not, Mr. Messenger?

A. Yes.

Q. And I think you also testified in answer to questions put to you by Mr. Lasky that if the conditional credits which were entered on the basis of the checks that were introduced in evidence—

Mr. Lasky: They were marked for identification as plaintiff's No. 4.

Mr. Erskine (Continuing): The checks that were introduced in evidence and marked as Mr. Lasky has just stated, Plaintiff's Exhibit 4 for identification, which I now show to you, that if you deducted the conditional credits entered upon the basis of those checks from the credit balance to which the United Produce Company was entitled on the books of your bank, that there would not have been any credit to the credit of the United Produce Company against which the six checks could have been paid?

Mr. Lasky: Now, if the Court please, I will object to the words, "to which United Produce was entitled" as calling for a [197] legal conclusion.

Mr. Erskine: Yes, I agree that that is right, your Honor. Let me—although it is a long question—attempt to restate it.

Q. You testified, Mr. Messenger, that if the conditional credits given United Produce Company on the basis of the checks which have been marked

(Testimony of Frederick C. Messenger.)

Plaintiff's Exhibit 4 for identification in this case, were deducted from any credits to which the United Produce Company may have been entitled on your books, the result would be that there would have been no credit to the account of that company against which the six checks could have been paid?

Mr. Lasky: Well, I think the same objection there lies to the "may have been entitled." I suppose the question is addressed to any credit which appeared on the books or appeared to be there. That would be all right.

The Court: Yes, that is what it is directed at.

Mr. Erskine: Well, I will try once more. I am sorry to take up the time. I will try once more. I think what Mr. Lasky says is doubtless right.

Q. If those checks, Plaintiff's Exhibit 4, or if the conditional credits entered on the books of the Merchandise Bank, on the basis of those checks had been deducted from any credit which may have appeared to be to the credit of the United Produce Company on your books, there would not have been any apparent credit to the credit of that company on your books against [198] which the six checks could have been paid. That was your testimony?

A. Of course your question is quite long and involved, and you are asking me whether that was my testimony?

Q. Yes.

A. I don't think I could just answer and say that was my testimony, because I can't remember.

Q. Well, I think that your point is well taken.

(Testimony of Frederick C. Messenger.)

Let me read the testimony. That would be the quickest way.

The Court: Well, if it is there, why take up our time? If he has testified to it, it is there.

Mr. Lasky: He has testified to that general effect and substance.

Mr. Erskine: It is all preliminary. What is that?

Mr. Lasky: He has, I believe, testified to that general effect and substance.

Mr. Erskine: Yes. Well, all right. [199]

Q. (By Mr. Erskine): Is it a fact, Mr. Messenger, that the six checks were charged against what you termed fictitious credit on the books of your bank?

A. They were charged against the balance appearing on the commercial ledger, which had conditional credits entered on that ledger sheet.

Q. Did you testify upon the taking of your deposition the reason the checks were paid in error was they were charged against fictitious credit?

A. That was last December, and just exactly what my answers were to specific questions—

Q. I haven't got the exact reference but I will pick it up later.

I wanted to put those questions, which I did not do very aptly, for this reason, your Honor: That statement the witness made the other day raises a lot of legal points. Your Honor will recall I objected to the question upon that ground. Now, I can either do one of two things. I can either cross-examine this witness for the purpose of showing what he means

(Testimony of Frederick C. Messenger.)

when he says that the six checks were charged against conditional credit appearing on the books of the United, and that as those conditional credits were not true credits, the charge of the checks was made by mistake. I do not say that that is what he testified to, but I believe that is the position of the plaintiff. I can either cross-examine him for the purpose of [200] showing what he means by that, and if I do cross-examine him in that way I will have to introduce and have marked for identification the commercial account of the United Produce Company with the bank, the ledger, the draft ledger, discount ledger of that company with the bank and the other ledger which he has mentioned in his testimony, and I will attempt on the basis of that cross-examination to show exactly what he means by conditional credit. I could either do that or we could follow the course which we followed on Friday—I believe it was Friday—of trying to arrive at a stipulation with respect to those facts, and I think it will save time and it will be clearer if we adopt the course of attempting to arrive at a stipulation so that we can determine exactly what this witness means when he talks about conditional credit.

Mr. Lasky: Whichever you prefer, because if you did not put in those particular sheets we are talking about or samples of them, I had proposed to do so, so the Court would get the basic facts. If you wish to try to work out a stipulation on it, I will cooperate. I think we can help it along. And in that event I would reserve the right of some redirect

(Testimony of Frederick C. Messenger.)

examination of the witness relative to the subject, if we were not able to stipulate to the whole thing.

The Court: You could probably do it in fifteen minutes or so right now, could you?

Mr. Erskine: I think we can do it right now, but it might [201] take a little longer.

Mr. Lasky: There is no mystery about it.

The Court: That is what I say. It seems to me you can work that out. Did you want to do it in chambers with me or just work it out yourself?

Mr. Lasky: I think in chambers with the Court would be an excellent idea.

Mr. Erskine: I think so, too.

The Court: Very well. The Court will stand in recess.

(Recess.) [202]

June 19, 1950, 2:30 P.M.

The Clerk: Merchandise National Bank vs. Bank of America, on trial.

Mr. Erskine: Was it the understanding that I would try to state that stipulation with respect to the payment of the six checks now?

Mr. Lasky: Yes, I think you might as well, not with respect to the payment, but with respect to the handling.

Mr. Erskine: Yes, that is right. The six checks which have been introduced in evidence in this case and marked Defendant's Exhibit E, the facts with respect to the handling of those six checks were these: I might say I will not try to cover the facts

(Testimony of Frederick C. Messenger.)  
relating to them that have already been covered by stipulations.

Prior to the time that the checks were sent forward by the Bank of America they were endorsed by the Bank of America as follows: "Pay to the order of any Bank or Trust Company, all prior endorsements guaranteed, November 13, 1948, East Bakersfield Branch, Bank of America National Trust and Savings Association, Bakersfield, California." Each of the checks was so endorsed. When the checks were received at the Merchandise Bank November 15, 1948, the Merchandise Bank sent out a form of acknowledgment of the receipt of the checks, copy of which I would like to introduce in evidence and have marked Defendant's Exhibit next in order. [203]

(The form of acknowledgment referred to was thereupon received in evidence and marked Defendant's Exhibit F.)

Mr. Erskine: On the same day, that is, on November 15, the Merchandise Bank sent out the document which has already been introduced in evidence and marked Defendant's Exhibit A for identification. The stamp appearing upon the face of this document, Defendant's Exhibit A, reading "Paid, November 15, Merchandise National Bank of Chicago" is the stamp of the Merchandise Bank and was put on the advise of credit on that date. I might say that when the six checks were sent forth by the Bakersfield Branch to the Merchandise National

(Testimony of Frederick C. Messenger.)

Bank, they were accompanied by a so-called Collection Letter dated November 13, 1948, which I would like to have introduced in evidence and marked Defendant's Exhibit next in order.

(The collection letter referred to was thereupon received in evidence and marked Defendant's Exhibit G.)

Mr. Erskine: The stamp appearing upon the face of this Defendant's Exhibit G, "Paid November 15, 1948, Merchandise National Bank of Chicago," was put on there by the Merchandise National Bank and is the stamp of that bank. There appears upon the face of this Defendant's Exhibit G, an arrow in pencil above which appears the words "Mail to" that arrow and those words were written on Defendant's Exhibit G by an employee of the Merchandise National Bank, and on November 15 this document, Defendant's Exhibit G, was mailed by the Merchandise Bank back to the Bank of [204] America.

Mr. Lasky: You say "back to." It happened to be mailed to the head office.

Mr. Erskine: It was mailed to the head office, or, shall we say, the central office of the Bank of America located in San Francisco, on that date, November 15, 1948, and the document marked Defendant's Exhibit F, and the acknowledgment, and the document marked Defendant's Exhibit A, the advice of credit, were mailed by the Merchandise Bank on November 15, 1948, to the central office of the Bank of America.

Mr. Lasky: No, the advice of credit, Exhibit A, was mailed out to the central office.

(Testimony of Frederick C. Messenger.)

Mr. Erskine: Went to Bakersfield?

Mr. Lasky: I think the acknowledgment went directly to Bakersfield, that is correct.

Mr. Erskine: My mistake, the document marked Defendant's Exhibit F, the acknowledgment, was mailed directly to the East Bakersfield Branch by the Merchandise Bank on November 15, whereas the advice of credit, Defendant's Exhibit A, was mailed by the Merchandise Bank to the Central Office of the Bank of America in San Francisco.

On November 16, pursuant to the practice of Post dating, the Merchandise Bank debited the six checks against the account of the United Produce Company in its bank, and pursuant to the same practice of post-dating, which will be explained later by a [205] stipulation, the Merchandise Bank credited, as of November 15, the account of the Bank of America—

Mr. Lasky: Let us leave out for a moment what was done with the account of the Bank of America, because that is a somewhat different situation. Leave it out for a second and go on with your other matters.

Mr. Erskine: I think I said that pursuant to the practice of post-dating the Merchandise Bank debited the six checks on November 16 to the account of the United Produce Company, the commercial account of the United Produce Company, that debit appearing upon the commercial account of that company as of November 15, 1948, and that same day, November 15, 1948, the Merchandise Bank perforated

(Testimony of Frederick C. Messenger.)  
each of the six checks with a stamp "Paid, November 15, 1948."

The Merchandise Bank kept an account showing the relationship between it and the Bank of America as part of the books of the Merchandise Bank and that on November 16, as of November 15, the Merchandise Bank credited the Bank of America with the amount of the six checks.

Mr. Lasky: Entered a credit entry on that particular ledger sheet in that amount, yes.

Mr. Erskine: I will accept the statement Mr. Lasky just made.

Mr. Lasky: Will you add to that, to save some interrogation, that this ledger sheet maintained by Merchandise National Bank [206] of this account with the Bank of America was a "Due from" account with the Bank of America, not "Due to," and that it was regularly kept and intended solely for internal use and that no transcript copy or portion of it ever did go out to the Bank of America or ever was intended to go out to the Bank of America.

Mr. Erskine: I am not sure of that factor. I will ask Mr. Tobey.

I think that if there is a question between us with respect to that particular matter, would like to offer the ledger sheet itself in evidence so the Court can see it.

Mr. Lasky: That is all right. I have no objection.

Mr. Erskine: We have it here, and unless coun-

(Testimony of Frederick C. Messenger.)

sel wants to make any explanation of it that he wants to make by testimony, he can do so, but we do not know enough about it to admit it.

Mr. Lasky: Very well.

Mr. Erskine: So far as I am concerned, those are the facts with respect to the six checks. If counsel at this time wants to state what was done with respect to charging back those six checks against the account, I will be willing, I am quite sure, to agree to it. But I understand my statement up to this point is agreed to.

The Court: It is agreed to and stipulated.

Mr. Lasky: It is agreed to and stipulated. Of course, it is understood when counsel says Merchandise National Bank sent out the advice and perforated the checks, the stipulation is that [207] the employees, people in the employ of the Bank did so.

The Court: I do not know how else the Bank could do it if it did not do it through employees.

Mr. Erskine: In view of what counsel has said, I would like to say this, that all the acts described, which I have attempted to describe, were done in accordance with a regular routine and practice of the Bank. That was testified to.

Mr. Lasky: It was a routine and practice which was followed with respect to collections where there were funds against which to pay, yes.

Mr. Erskine: Without any qualification, all of those acts were done in accordance with practice and routine of the Bank in dealing with checks presented for payment.

(Testimony of Frederick C. Messenger.)

Mr. Lasky: Where checks came into the bank on a collection letter and are drawn against accounts in that bank there are funds to meet it; that is the routine it went through, of course.

The Court: That is the routine it went through in this instance.

Mr. Lasky: It certainly was the routine it went through in this instance, no question.

Mr. Erskine: What is that?

Mr. Lasky. The Court added "and that was the routine that was followed with respect to the checks in this instance," and I said "certainly so."

Mr. Erskine: Of course, you see Mr. Lasky says where there [208] are funds to meet it.

Mr. Lasky: All right, I think we are fencing for nothing.

Mr. Erskine: I think we are too. It was the routine. The six checks were handled and the acts which I have described were performed with respect to them.

The Court: In a routine manner.

Mr. Erskine: In accordance with a regular practice and routine of the bank, is that right?

Mr. Lasky: Well, I do not see any hidden hooks on it, and it sounds all right to me, yes. That is the routine that would be followed.

Mr. Erskine: That is all I have to say. If you want to talk about the charging of those checks now, I will agree to what you say.

Mr. Lasky: All right. [209]

(Testimony of Frederick C. Messenger.)

Mr. Erskine: As of the 19th—on the 20th, as of the 19th.

Mr. Lasky: Well, pursuant to the practice of post-dating.

Mr. Erskine: That's right.

Mr. Lasky: On the 20th as of the 19th the six checks, the credit for the six checks on the commercial ledger sheet of the United Produce Company was reversed, a reversing entry, stating that it had been entered in error. Am I correct in that?

Mr. Erskine: Did it show on the commercial ledger sheet that it was entered in error?

Mr. Lasky: I am not sure of my memory on that. The witness had that. Here we are.

Mr. Erskine: Mr. Tobey calls to my attention the fact that that acknowledgment went to San Francisco first and not to Bakersfield.

Mr. Lasky: Doesn't have any such stamp on it.

No, I withdraw my statement that they had a notation. The reversing entries were entered on the 20th as of the 19th.

Mr. Erskine: Without any notation as to—

Mr. Lasky: There wasn't any notation. Then on the due from account, that has been described as the Bank of America account, also on the 19th, there was a reversing entry entered, and that did have some notation.

Mr. Erskine: Well, we will get that for you right away.

Mr. Lasky: Perhaps the witness could find the original of it. [210]

(Testimony of Frederick C. Messenger.)

(Witness left the witness stand and examined files.)

Mr. Erskine: Do you want to use this?

Mr. Lasky: Yes, there is an entry. I have it here. There is an entry under date of the 19th, \$113,000 is the first with a notation "Rev.," the abbreviation for "reversing," an entry of eleven fifteen, United Produce, collection—"Coll.," and then "6919."

Mr. Erskine: Now I would like to offer this in evidence.

Mr. Lasky: Of course I have no objection. I thought we were eliminating all such by the stipulations. Otherwise, the sheets speak for themselves.

Mr. Erskine: That's right, but in view of the question as to the effect of this particular sheet, I want to show the character of the sheet.

The Court: Very well, have it marked and it will be admitted in evidence.

Mr. Lasky: No objection.

Mr. Erskine: I would like to show it to the Court.

The Clerk: Defendant's Exhibit H in evidence.

(Whereupon photostat of bank ledger sheet referred to above was received in evidence and marked Defendant's Exhibit H.)

Mr. Erskine: I think your Honor might be interested in seeing this one, and if you will permit me to, I will show it to you and call your attention to the entries. There is the [211] credit made as of the

(Testimony of Frederick C. Messenger.)

15th, and here is the off-set made as of the 19th (document examined by the Court); that is the account kept by the Merchandise Bank to show its business transactions with the Bank of America.

The Court: Is this the account with which—I see, yes. I see. The notation is here on the left.

Mr. Lasky: That's right.

The Court: Yes, very well.

Mr. Erskine: That is correct—my statement—Mr. Lasky, that that is the ledger sheet of the account kept by the Merchandise Bank to show its business transactions with the Bank of America?

Mr. Lasky: It is true as far as it goes, yes. It is a true copy.

Mr. Erskine: Now I think that we might be able to stipulate to one other series of facts, here.

Mr. Lasky: Of course, talking about orderly procedure, it seems to me the defense is putting in its evidence. I have no objection, but it might be more orderly if we get the plaintiff's case in.

The Court: If it is here, let's put it in. Matters that you refer to necessarily are part of your case. If you have an exhibit that should be in evidence and it can now be stipulated to, let's get it in and get it over with.

Mr. Erskine: I was going to ask the witness certain [212] questions with respect to these documents as part of my cross-examination, but I think that Mr. Lasky and I, who are both—

Mr. Lasky: Well, you have before you the in-

(Testimony of Frederick C. Messenger.)

ternal documents of the Bank of America, about which this witness would know nothing.

Mr. Erskine: Yes. Well, part of them are internal documents of the Bank of America; part of them are documents received by it from Merchandise.

(Conversation among defendants out of hearing of reporter.)

Mr. Lasky: I would respectfully suggest to the Court that we get on with the cross-examination of the witness so we can proceed with the trial.

The Court: Well, counsel is looking through some papers there. He may take his time.

Mr. Erskine: I will put it upon cross-examination.

The Court: Very well, proceed.

Q. (By Mr. Erskine): Mr. Messenger, do you recall the Merchandise Bank receiving from the Bank of America a collection letter accompanying four checks drawn by the United Produce Company to the order of Lofendo, aggregating \$89,613.10?

Mr. Lasky: Just a moment. I object to it, if the Court please. There is no cross-examination of anything on direct, and I am not sure what it is.

Mr. Erskine: Well, it is cross-examination, your Honor. The purpose of it will appear very soon, and I can assure the [213] Court that it is proper cross-examination. This witness testified with respect to the six checks, that the six checks were charged in error against the account, and I want to show in

(Testimony of Frederick C. Messenger.)

an exactly similar situation, a similar contention was not made, which certainly has a bearing upon the witness' testimony that the six checks were charged in error.

The Court: Very well, proceed. The objection is overruled.

A. Your question is that I have knowledge that there was such a collection?

Q. (By Mr. Erskine): That's right.

A. Yes, I have.

Q. Now I show you a document—

Mr. Erskine: Will you mark that for identification, please?

The Clerk: Defendant's Exhibit I for identification.

(Whereupon copy of collection letter referred to above was marked Defendant's Exhibit I for identification only.)

Q. (By Mr. Erskine): I show you a document, Mr. Messenger, which has just been marked Defendant's Exhibit I for identification, and ask you if that is not a copy of the collection letter to which I have just referred?

A. I don't think this is a copy of the collection letter itself. It is the Bank of America's permanent record, perhaps, but it might cover the same [214] items.

Mr. Lasky: Well, the witness doesn't know what it is. It is a Bank of America record. He is guessing what it might be.

Q. (By Mr. Erskine): Well, at any rate, Mr.

(Testimony of Frederick C. Messenger.)

Messenger, if you can't identify this, I will ask the Clerk—

Mr. Erskine: —to mark these papers. Mark them all as one exhibit, if that is all right.

The Clerk: Defendant's Exhibit J for identification.

(Whereupon documents referred to above were marked Defendant's Exhibit J for identification only.)

Q. (By Mr. Erskine): I will ask you whether or not the Merchandise Bank sent to the Bank of America the documents which have just been marked, the four documents which have just been marked Defendant's Exhibit J for identification?

Mr. Lasky: Well, of course, while reserving the objection I made before that this isn't cross, I will stipulate that those are documents which Merchandise did send to the Bank of America, according to the various representations or stamps that appear on them.

Mr. Erskine: What was that?

Mr. Lasky: In accordance with any representations or stamps that appear on the face. They show the dates.

Mr. Erskine: Yes.

Mr. Lasky: And I will stipulate that they were so sent out. [215]

Mr. Erskine: That they were sent out and that the notations and stamps appearing on them are the notations of the Merchandise Bank and the stamps of the Merchandise Bank?

(Testimony of Frederick C. Messenger.)

Mr. Lasky: Some notations are those and some are the other. I think they rather speak for themselves.

Mr. Erskine: Where are the notations of the Bank of America?

Mr. Lasky: I am mistaken. That's right. You are correct; all notations were put on by the Merchandise Bank.

Mr. Erskine: Yes.

The Court: Very well.

Mr. Erskine: And the stamp "Paid" on each one of these four documents is the stamp of the Merchandise Bank, is that right?

Mr. Lasky: That's right.

Mr. Erskine: And the four checks received, four checks to which those documents relate, the documents marked Defendant's Exhibit J for identification, were received with the form of collection letter similar to the collection letter which has been introduced in evidence and marked Defendant's Exhibit G?

Mr. Lasky: Similar form. I will stipulate to that, but object to the fact as immaterial. This relates to an earlier collection item over which no question has been raised. You could go back and get many more, I imagine.

Mr. Erskine: And similar to the collection letter marked [216] Defendant's Exhibit G, except that it was dated November 10th instead of November the 13th.

Mr. Lasky: Well, I mean, if you are going to

(Testimony of Frederick C. Messenger.)

find differences of dates, there are differences in amounts. It is a similar form.

Mr. Erskine: Similar form, except that the collection letter which accompanies the four checks was dated November 10th.

Mr. Lasky: And with other exceptions. It has different checks and different amounts.

Mr. Erskine: Yes, that's right. Different checks and different amounts and different dates. And the difference in date is that the collection letter relating to the four checks was dated November 10th, whereas the collection letter relating to the six checks was dated November 13th.

Mr. Lasky: Well, I have stated what I stipulate to. I don't know that I can clarify it. The same form was used, with the inserts in the banks, different, since it related to a different transaction on a different date, involving different checks in different amounts.

Mr. Erskine: That's right. But I still haven't got any proof of the date of the collection letter accompanying the four checks.

Mr. Lasky: Well, was it November the 10th?

Mr. Erskine: It was November 10th.

Mr. Lasky: Well, you show me some Bank of America document [217] that indicates that, and I will stipulate that that is a fact. But also object to its materiality.

Mr. Erskine: That is all right.

The Court: Very well.

Q. (Mr. Erskine): Now, Mr. Messenger, you

(Testimony of Frederick C. Messenger.)

have testified that the advice of credit which I am now showing to you, Defendant's Exhibit A for identification, relating to the six checks and sent out by your bank on November the 15th, was sent out in error; that is correct, is it not?

A. Yes, sir.

Q. And it was sent out in error because there were no credits, real credits, to the account of the Merchandise Bank against which the six checks could be charged, is that right?

A. There were no funds to pay.

Q. Yes. Or no real credits to pay, is that right?

A. That's right.

Q. Now, Mr. Messenger, I will show you these four advices of credit marked Defendant's Exhibit J for identification, which were sent out by your bank on November 12th, and I will ask you to explain what, if any, difference there was between the four checks referred to in the documents just shown to you, Defendant's Exhibit J, and the six checks.

Mr. Lasky: May I have that question read back, your Honor?

(Record read.)

Q. (By Erskine) (Continuing): So far as charging those [218] checks against the account of the United Produce Company is concerned. What difference was there between charging the four checks and charging the six checks?

Mr. Lasky: You mean in the routine that was followed?

(Testimony of Frederick C. Messenger.)

Mr. Erskine: No. Well, I had better go back again.

Q. You said, as I understood you, Mr. Messenger, that the six checks were charged in error because there were not any credits to the account of the United Produce Company, any real, true credits to the account of the United Produce Company, on November the 15th, against which the six checks could be charged; that's correct, is it not?

A. There were no true balance, no real balance, which they could be charged against.

Q. Then did you charge the four checks referred to in Defendant's Exhibit J against the account of United Produce Company—on what date?

A. The entry was made on these collections on November the 12th, and at that time these advices were sent out in error. There were no—

Q. I didn't ask you that. I asked you when you made the entry; when did you make the entry?

A. The collection was handled on November the 12th. [219]

Q. And the entry was made as of November 12th on November 13th, is that right?

A. The actual entries through the commercial ledger sheet.

Q. And when I refer to the four checks, Mr. Messenger, I will be referring to the checks referred to in this defendant's Exhibit J for identification. You will understand that, will you?

A. Yes, sir.

Q. Tell me, Mr. Messenger, was there any error made in the entry, in the charging of the four checks

(Testimony of Frederick C. Messenger.)  
against the account of the United Produce Company?      A. Yes, there was.

Q. What was that error?

A. Exactly the same error as that appeared on the six checks for \$113,216.50.

Q. That is, the error was that there was no true balance credited to the account of United Produce Company on the books of the Merchandise Bank on November 12, 1948, against which the four checks could be charged, is that correct?

A. That is correct.

Q. Did the Merchandise Bank ever make a claim against the Bank of America that the four checks had been charged against the account in error?

A. No.

Mr. Erskine: I think we will be able to stipulate to some [220] additional facts. Now, Mr. Lasky, as part of my cross-examination of Mr. Messenger.

Q. When did the Merchandise first hear from the Bank of America that any of the checks drawn by Lofendo to the order of the United Produce Company and presented to the Bank of America for payment had been rejected?

A. On November 15th the bank received a wire with reference to the rejection of checks.

Q. On November 15th Merchandise Bank received a wire from the Bank of America that certain Lofendo checks to the order of the United Produce Company had been presented to the Bank of America for payment and had been rejected, is that right?      A. That is right.

(Testimony of Frederick C. Messenger.)

Mr. Erskine: Have you got that wire here? Mr. Lasky, have you got that wire?

Mr. Lasky: I have if it is marked as one of the exhibits. Do you have the exhibit number?

Mr. Messenger brought out with him all the papers that were marked in Chicago, so if you will tell me the number we will find it.

Mr. Erskine: Without taking the time, we can introduce it later, and I think Mr. Lasky will stipulate to it.

Mr. Lasky: I will stipulate to all documents even though I may object to the materiality of their introduction.

Mr. Erskine: Mr. Messenger, when you received that wire [221] which we will produce or try to produce later, notifying you of the rejection by the Bank of America of three checks, did you prepare a wire, copy of which I am now showing you?

I had better mark this for identification.

Mr. Lasky: In your question, when you say "you"—

Mr. Erskine: I mean the Merchandise Bank.

The Court: You can probably stipulate with reference to that.

Mr. Erskine: Will it be stipulated that this paper that is marked Defendant's G for identification is a copy of a wire sent by the Merchandise Bank to Mr. Dunlap of the Bank of America?

Mr. Lasky: I will stipulate to that fact but I object to it as neither being material nor being any part of the examination or cross-examination of this

(Testimony of Frederick C. Messenger.)

witness. It has no relationship to anything asked on direct.

Mr. Erskine: I think it has this relationship, your Honor: It shows—

The Court: You are still showing the difference between the method of handling in the one instance—

Mr. Erskine: No, this is a different matter.

The Court: What does it go to then?

Mr. Erskine: This shows that the witness has testified to what happened in the Merchandise Bank of November 17th, the fact that he called up Mr. Etribou on that day, and I want to [222] show, as part of the circumstances relating to that call, this wire. They received a wire on November 15th that the Bank of America had rejected three checks. Then on November 17th the three checks arrived at the bank, the Merchandise Bank, on that day the witness sent out this wire—

Mr. Lasky: The witness did not send this out, definitely not.

Mr. Erskine: My recollection is he prepared this wire and sent it out.

The Court: Do you know what Defendant's Exhibit K for identification is (handing a document to the witness).

A. It is a coded wire to the Bank of America that went out from the Merchandise Bank.

Q. Did you prepare it? A. Yes, sir, I did.

Q. And had it sent? A. Yes, sir.

Mr. Lasky: While I was mistaken in my im-

(Testimony of Frederick C. Messenger.)

pression of who prepared it, I still submit it is not proper cross-examination. The witness testified nothing in relation to that wire. He testified to a conversation had on the telephone, and he testified to the fact that there was no balance against which the checks could be honored. This is something else again.

Mr. Erskine: It may be counsel is right. I can either prove it now or later. [223]

The Court: Let us prove it later then.

Mr. Erskine: All right, I will prove it later. I would like, if the Court please, to ask that the Defendant's Exhibit J for identification be admitted in evidence.

The Court: Those are the four checks—

Mr. Erskine: Those are the advices of credit relating to the four checks.

Mr. Lasky: I have stipulated to them but made an objection to their admissibility.

The Court: To their admissibility at this point, on the ground that they are immaterial.

Mr. Lasky: Yes, and at this point, and at every point, as being immaterial.

The Court: The objection is overruled.

(Defendant's Exhibit J for identification was thereupon received in evidence.)

Mr. Erskine: That is all so far as Mr. Messenger is concerned.

Mr. Lasky: I have a very few questions. Of course, Mr. Erskine and I are still to put in stipula-

(Testimony of Frederick C. Messenger.)

tion form the material we discussed this morning with respect to the relationship between the two accounts, and if we fail to do that I will ask permission as to call this witness for further questions.

The Court: There will be no failure on that. We have already been over it once. [224]

Mr. Lasky: I hope so.

### Redirect Examination

By Mr. Lasky:

Q. With respect to the collection item of \$89,000, Mr. Messenger, concerning which you have just been asked, the advice of credit went out from your bank on the 13th?

A. My recollection is the 12th?

Q. When you talked to Mr. Etribou on the 17th, did he state to you anything indicating whether or not that had already been received.

A. He made a statement to me that there were two outstanding collections totalling \$165,000 that had not been accounted for. One was the \$113,000 figure and was one for \$52,000. There was no mention made of a \$89,000 item.

Q. At the time did you have this collection item before you? A. I did have.

Mr. Erskine: What collection item?

Mr. Lasky: The \$89,000 that you brought up.

The Court: Is that the one evidenced by the four?

Mr. Lasky: The ones that I objected to, yes.

Q. After Mr. Etribou told you there were only

(Testimony of Frederick C. Messenger.)

two outstanding collections, was this included among those two? A. It was not.

Q. Did you conclude that this advice of credit had already been received by the Bank of America? [225] A. I had.

Mr. Erskine: Just a second. I suppose I can object to that upon the ground that his conclusion is not material.

The Court: The answer may be stricken and the objection is sustained.

Q. (By Mr. Lasky): Counsel has asked you whether or not Merchandise Bank has made any claim against Bank of America with respect to this \$89,000. I ask you why or the reason why Merchandise Bank made no claim against Bank of America with respect to this item.

Mr. Erskine: I object to that as calling for a conclusion of the witness and being incompetent, irrelevant and immaterial. The fact is the important thing.

Mr. Lasky: If the Court please, counsel has brought up some other collection and brought out the fact that no claim was made on it, as having some relevance to this case. I objected to the materiality. Now, if it is material, then it is material why the Merchandise Bank has made no claim on it.

The Court: Why it was handled in a different fashion.

Mr. Lasky: Yes. We handled it up to a certain point the same and then instead of making a claim we have not. Now, I want the witness to state why.

(Testimony of Frederick C. Messenger.)

The Court: The objection is overruled. You may answer.

A. There was no claim made on the \$89,000, no attempt to rescind credit because the conversation taking place with Mr. [226] Etribou of the East Bakersfield branch indicated to me and to Merchandise National Bank that the collection had been entered on their books. I was informed there were only two collections outstanding and the \$89,000 was not included with those two. The only thing that I could believe was that the \$89,000 had been entered through the books of the Bank of America. Therefore, we did not request any recision of credit.

Mr. Lasky: At the time you telephoned to Etribou?

A. That is right.

Q. Now, Mr. Messenger, with respect to the document that *has marked* Defendant's Exhibit H, general ledger of the account of the Bank of America, Merchandise National Bank, would you state the nature of that ledger sheet and purpose for which it is kept in your bank?

A. This is an internal document used by the bank for the purpose of keeping track of the transactions between the Bank of America and the Merchandise National Bank.

Q. Were any copies of it ever sent to the Bank of America at any time during the life of the account? A. No.

Q. Was any transcripts of it sent to the Bank of America at any time? A. No.

(Testimony of Frederick C. Messenger.)

Q. Was any statement drawn off of it sent to the Bank of America at any time? [227]

A. No statement of it was drawn off.

Q. Now, were the six checks we have been referring to, Defendant's Exhibit E, ever turned over at any time to United Produce Company?

A. They were not.

Q. Or to its trustee in bankruptcy?

A. They were not.

Q. Mr. Messenger, on your cross-examination you were shown Defendant's Exhibit 3B. You *were* recall this document being one part of the memorandum that you prepared after the telephone conversation. You were shown this sentence on the last page of 3B: "Mr. Etribou said he would do everything possible to help us in our problem and would be glad to discuss the matter with Mr. LeRoy when he arrived." Now, Mr. Witness, I show you here page 3A, the first page of the same memorandum, and I call your attention to the last paragraph on that page, reading as follows:

Mr. Erskine: Just a second, if the Court please. I object to this question on the ground it is not proper redirect examination. The witness certainly cannot be led with respect to what was said in that conversation. The document which counsel is reading to him is not in evidence. It is just a memorandum made by the witness at the time that the conversation took place. I consider the question highly improper to read to the witness a part of

(Testimony of Frederick C. Messenger.)

that memorandum in order to ask him whether something of that sort was said. [228]

The Court: That is a well-taken objection. The witness testified that he used the memorandum he referred to to refresh his recollection, didn't he? It has no other purpose in evidence. It is not in evidence.

Mr. Lasky: No, I did not offer it in evidence for that reason. This is why I bring it up now: Counsel in cross-examining—and I suppose for the purpose of impeaching the witness—showed him *once* sentence and asked him if his *testify* therefor was erroneous that he had given before.

The Court: And he said yes, it was.

Mr. Lasky: Yes, and at the time I suggested the rest of the memorandum be shown to him in fairness, because the rest of the memorandum has something else on the same point, showing his memory was not erroneous.

The Court: You can ask the witness, of course, what his memory is of the transaction. That is not in evidence and it cannot be used by you in establishing the truth of what the occurrence was.

Mr. Lasky: I am not so sure of that because a document written immediately afterwards may be good evidence.

The Court: Oh, it may be if it was kept in the regular course of business. It may very well be. It has not been offered for that purpose. It has not been accepted for that purpose. It was used merely to refresh his recollection. His testimony is what

(Testimony of Frederick C. Messenger.)

we receive in evidence. What is on that paper is not [229] received in evidence.

Mr. Lasky: No, but am I not entitled to use it now in an attempt to refresh his recollection to see whether when he said he testified wrongly—

The Court: No, not until his memory is exhausted.

Mr. Lasky: He has already testified—

The Court: He has already testified to everything. What are you going to do, go over the same ground?

Mr. Lasky: No, Your Honor, but it seems to me highly improper for counsel to pick one sentence out, and without having shown the witness the remainder, suggest to the witness and lead the witness in saying he was erroneous in his testimony.

The Court: You may ask him if he has any explanation to give in answer to that, but he need not refer to the document. His memory has been clear. He testified on direct examination without reference to the memorandum and said he did not need to refer to it.

Mr. Lasky: Well, he testified without it. I submitted it to him and he said there was nothing more he wanted to add to it.

The Court: Now you can ask him if he wishes to make any explanation of the testimony he gave on direct examination.

Mr. Lasky: Very well, Your Honor, I will do that.

Q. Mr. Messenger, counsel called your attention

(Testimony of Frederick C. Messenger.)

to this last sentence on one page of the memorandum: "Mr. Etribou said he [230] would do everything possible to help us in our problem and would be glad to discuss the matter with Mr. LeRoy when he arrived." You were asked whether you were in error in making a statement that that had not occurred in the telephone conversation. Have you any explanation to make of that?

Mr. Erskine: I do not know about that. The form of the question strikes me as very odd, Your Honor. What I asked the witness was simply this: I said, "Isn't it a fact that Mr. Etribou told you he would do what he could to help out the Merchandise Bank and that he would discuss the matter with Mr. LeRoy when Mr. LeRoy arrived in Bakersfield."

The Court: Yes.

Mr. Erskine: I asked the witness that and the witness said no, he didn't tell me that.

The Court: When you called his attention to the memorandum.

Mr. Erskine: I called his attention to the memorandum.

The Court: And he said, "I was mistaken. He did."

Mr. Erskine: "I was mistaken. He did tell it to me."

The Court: Yes.

Mr. Erskine: Now, all this beating about the bush with these questions—

Mr. Lasky: My purpose is the witness had

(Testimony of Frederick C. Messenger.)

already testified more fully to that conversation then and what else you said about what would happen when LeRoy arrived, and this counsel [231] by taking this one sentence, sought to restrict what the witness had said about it when in fact what he fully had said on it is correct and otherwise appears in the memorandum.

Mr. Erskine: I was not trying to restrict his previous testimony at all. I was trying to find out whether he really remembered that conversation, and I asked him whether or not it was a fact that that was said and he said, "No." It was proper cross-examination and I do not believe counsel can read it to him and read other parts of the memorandum to him for the purpose of qualifying that very clear occurrence. [232]

The Court: Yes, counsel, I don't understand your position. The facts are as stated by Mr. Erskine, that upon examination he was asked if a certain thing wasn't said. He said, "No, it wasn't." Mr. Erskine then handed him the memorandum and said, "Now, will you read that, and now do you say as to what the conversation was," and he said, "the conversation is as—the matters were discussed." Now if he made an error in saying that, you may have him explain how he made an error in saying it.

Mr. Lasky: Well, I will ask him this question.

The Court: But you may have the witness explain any error he made; but I don't see what it has to do with the memorandum.

(Testimony of Frederick C. Messenger.)

Mr. Lasky: I don't think the witness made an error.

The Court: Well, then—

Mr. Lasky: Well, I will ask the witness this question:

Q. With respect to this particular statement that you have testified to Mr. Erskine, that Mr. Etribou stated he would do everything possible to help you in your problem and would be glad to discuss the matter with Mr. LeRoy when he arrived, will you state the remainder of the conversation on that subject?

A. That was a finishing conversation. The original part of the conversation was that there was a definite recission and agreement. [233]

Mr. Erskine: Wait a second, now. I ask that go out, your Honor, that there was a definite recission. That is a statement of a conclusion.

The Court: That is a conclusion.

Mr. Erskine: He can just state the conversation.

A. (Continuing): That I had stated to Mr. Etribou that we were rescinding the credit, and Mr. Etribou had agreed to it.

Mr. Lasky: Well, don't—State what he said, not that he agreed.

A. (Continuing): Mr. Etribou said, "We will do whatever you want us to do. We will pay checks—"

Mr. Erskine: Are you reading from something now?

The Witness: No, sir.

(Testimony of Frederick C. Messenger.)

Mr. Lasky: He has that ledger sheet.

The Witness: That wasn't taken away from me.

A. (Continuing): "We will either pay checks or not make entry, whichever you wish us to do." And we said, I said, "We do not want you to make entry."

Q. Well, I am directing your attention particularly to the conversation in which Mr. LeRoy was mentioned.

A. That was the finishing of the conversation, and he said that he would work with Mr. LeRoy, discuss the thing, see what can be done. It wasn't just a problem, one problem of \$113,000; it was the whole problem of returned checks and everything.

Mr. Lasky: I offer this— [234]

Mr. Erskine: Well, I ask the last statement of the witness go out, that it wasn't only one problem, it was the other problem. That is the statement of his conclusion. I don't understand that that was part of the conversation. That is just an explanation.

The Court: It may be stricken.

Mr. Lasky: Now, if the Court please, I offer Plaintiff's 3-A and B, which are now marked for identification, in evidence as a document made immediately after the conversation, when the memory was fresh and ripe.

The Court: Let me see it.

Mr. Erskine: I object to it, if Your Honor please.

The Court: It is offered for what purpose?

(Testimony of Frederick C. Messenger.)

Mr. Lasky: In evidence.

The Court: For what purpose?

Mr. Lasky: As evidence of the conversation, because it was made immediately after the conversation.

Mr. Erskine: I object to it, if the Court please, on the ground, it is incompetent, irrelevant, and immaterial, it purports to be nothing but a contemporaneous memorandum which a witness may use to refresh his recollection—if his recollection is not sufficient without reference to the memorandum. It is not a memorandum kept in the ordinary and usual course of business in order to state facts occurring contemporaneously with certain entries. It is not admissible for any purpose [235] whatever, and I object to it on those grounds.

Mr. Lasky: A memorandum, as I understand, which has been made at the time in question and has been preserved, may be used in evidence.

The Court: Well,—

Mr. Erskine: It is, in addition to that,—

The Court: Well, that would depend on all the other circumstances, whether it may be admitted in evidence.

Mr. Erskine: Let me say it is—

The Court: I don't see it is admissible here, counsel. The witness has testified to the conversation. He has testified that he knows the—he related the conversation fully. He didn't have to refer to the memorandum. This is not past recollection recorded; he made it entirely to refresh his memory,

(Testimony of Frederick C. Messenger.)

and he said he didn't have to use it to refresh his memory. He didn't have to use it for that purpose; looking at it, he didn't even have to look at it to recall the whole conversation.

Mr. Lasky: Well, he looked at it afterwards and then found he had nothing to add.

The Court: Well, looking at it and finding that he had nothing to add, it is of no value to us. He has testified to what the conversation is, and I will sustain the objection.

Mr. Lasky: That is all, Mr. Messenger.

#### Recross-Examination

By Mr. Erskine:

Q. So as I understand you, Mr. Messenger, the difference between the four checks and the six checks is that you inferred from your conversation with Etribou that the Bank of America had entered the credit relating to the four checks in its books, whereas when you talked to Etribou on the 17th, the Bank of America had not entered the credit relating to the six checks; is that the difference?

A. I assumed that the advice of credit for the \$89,000 had been received and acted upon, where the advice for the \$113,000 had not been received; so therefore no action taken thereon.

Q. I thought you talked about the fact that you inferred that the Bank of America had entered the credit on the four checks from your conversation

(Testimony of Frederick C. Messenger.)  
with Etribou on November the 17th. Is that a fact?  
Did you infer that?

A. No, I had no knowledge what entries they had made. I was advised that there were only two collections outstanding, and I had collections for three different groups in front of me. If there were only two outstanding, I could only assume that the matter had been handled by the East Bakersfield branch.

Q. In other words, when Etribou told you that there were only two collection letters outstanding, aggregating \$165,000—one for \$113,000 and the other for \$52,000—you inferred that the \$89,000 was entered on its books, did you not,—the Bank of America?

A. I assumed that it had been. [237]

Q. Yes. And that was the difference, in your opinion, between the four checks and the six checks. The four checks, the credit for the four checks had been entered on the books of the Bank of America, whereas on November 17th, the credit for the six checks had not been entered. Is that the difference?

A. That is what I assumed. That is the difference.

Q. Yes. All right. Now in testifying with respect to Defendant's Exhibit H, you said it was an internal document kept by the Merchandise Bank for the purpose of keeping track of its transactions with the Bank of America, is that right?

A. Yes, sir.

(Testimony of Frederick C. Messenger.)

Q. It was kept in the ordinary course of business, was it not? A. Yes, sir.

Q. And it was kept for the purpose of showing how much the Bank of America owed you and how much you owed—that is, how much the Bank of America owed the Merchandise Bank and how much the Merchandise Bank owed the Bank of America, was it not? A. No, sir.

Q. What's that? No, sir.

Q. Well, for what purpose was it kept, then?

A. It was an account that we maintained at the Merchandise Bank that represented the balance which the Bank of America owed to us.

Q. And it showed the balance which the Bank of—and it was [238] kept for the purpose of showing the balance which the Bank of America owed you, is that right? A. That is correct.

Q. And therefore you entered on that ledger the amount of debits in your favor and the amount of credits in favor of the Bank of America, did you not? A. That's right.

Mr. Erskine: I think that's all, your Honor. Yes, that is all.

Mr. Lasky: No further questions here.

Mr. Erskine: Oh, pardon me. One second.

Q. I think you testified, Mr. Messenger, that the six checks were not turned over to the Bank of America—I mean, to the trustee in bankruptcy of the United Produce Company, or the United Produce Company itself. That's correct, is it not?

A. That's right.

(Testimony of Frederick C. Messenger.)

Q. As a matter of fact, you sent the six checks to the Bank of America with a letter here that is dated November the 19th, 1948, and has been introduced in evidence as Defendant's Exhibit D (handing to witness).

A. The checks were sent to the Bank of America, East Bakersfield, with that letter.

Q. And you received those checks back, did you not, with a letter from the Bank of America, a copy of which I now show you? [239]

Mr. Lasky: Well, now, of course if that goes in, then we have got to put in that stipulation the checks came back again, and I thought we were going to eliminate all that as unnecessary tomfoolery.

Mr. Erskine: Well, that's right, except you asked what was done with the six checks, and I want to show that this letter in response to the letter you have already introduced in evidence—

Mr. Lasky: Well, the fact we didn't give it to the United Produce Company doesn't mean we have got to go through all this rigmarole of the checks going back and forth between the two banks.

Mr. Erskine: I want to show what happens to the six checks. You said they were not given to the United Produce.

The Court: Well, I thought you were stipulating as to what happened to the six checks.

Mr. Lasky: I thought we had.

Mr. Erskine: I don't think the letter is covered by the stipulation, but if it will be covered, I will

(Testimony of Frederick C. Messenger.)

stop talking about it. I will withdraw it and I will try to put it in my stipulation.

The Court: I don't think it makes any difference. The checks were sent back and then back again—that is, were sent from the Merchandise Bank to the Bank of America, from the Bank of America back to the Merchandise,— [240]

Mr. Erskine: That's right.

The Court: —and eventually back into the Bank of America again. Now those are the facts of the case.

Mr. Erskine: That's right.

Mr. Lasky: Correct.

The Court: What difference does it make what letter accompanied them? Does it have any bearing on any of the issues?

Mr. Erskine: Well, except, your Honor, that this letter says that the return of these checks was agreed upon by our head office—that is, the Letter of November 19th, which has been introduced in evidence as Defendant's Exhibit D. And the letter that I am now offering, which is a letter from Etribou to Messenger, says, "We cannot accept the return of these checks, as there has been no agreement for their return with this bank."

The Court: Oh, what difference does it make? That means they are all just kind of feeling their way around to find out what the legal effects of all their transactions are; isn't that what happened?

Mr. Erskine: That's right. They are both self-

(Testimony of Frederick C. Messenger.)  
serving papers. Well, as long as one is in, I would like to have the other.

The Court: Well, you can put them both in; but it doesn't make any difference. Both of them could go out, as far as that [241] is concerned.

Mr. Lasky: Well, some of the cases seem to put some significance in the fact that the receiving bank or collecting bank had not turned over the paper, the checks, to the party from whom the funds were to be collected, but sends it back to the forwarding bank. Some of the cases attach some significance to that.

The Court: Well, that is stipulated to already, the facts concerning that.

Mr. Lasky: And certainly I would make no contention that the letter, in returning these checks, was evidence of any agreement binding upon the Bank of America, if there was an agreement.

Mr. Erskine: Well, apropos, I would like to have—

The Court: By way of your stipulation, you have already stipulated to the facts. Why don't you withdraw that exhibit, then, if that is bothering you, the first covering letter?

Mr. Erskine: Well, the exhibit has a bearing on my cross-examination of Mr. Messenger.

The Court: Well, all right, put the other one in, then. Let's get on with the matter. I don't see that the letter will help us.

The Clerk: Defendant's Exhibit L.

(Testimony of Frederick C. Messenger.)

(Whereupon covering letter referred to above was received in evidence and marked Defendant's Exhibit L.) [242]

Mr. Erskine: And in view of the statement just made by Mr. Lasky, I would like to ask one more question, Mr. Messenger. Mr. Lasky, as I understood his statement, said that there was some authority that said that the disposition of the checks had some bearing upon the decision of the legal issues which may be decided in this matter. Therefore I will ask Mr. Messenger this:

Q. On November the 17th and 18th, Mr. Messenger, the Merchandise Bank and you, as an officer of the Merchandise Bank, knew that you were going to take a substantial loss arising out of your transactions with the United Produce Company, did you not? A. Yes, we did.

Q. And you were doing whatever you could to minimize that loss on those dates, is that right?

A. That's right.

Mr. Erskine: That is all.

Mr. Lasky: No further questions.

The Court: Very well, call the next witness.

Mr. Lasky: Well, now, at this time, if the Court please, I think we ought to get into this stipulation that we worked up last Friday in an orderly fashion. Now I gave you a written copy this morning, so we have read it before, the Court has read it. I see no reason for reading it now.

The Court: No.

(Testimony of Frederick C. Messenger.)

Mr. Erskine: Except that I have not re-read the copy of it, [243] your Honor—the new, clean copy that you handed to me this morning. I just haven't had a chance to read it. I will read it this evening.

The Court: Well, let's take a 15-minute recess, and you can read it, and it will be done.

Mr. Erskine: All right.

The Court: The Court will stand in recess until 4 o'clock.

(Recess.) [243-A]

(Counsel for the respective parties discussed with the Court off the record a proposed stipulation, after which the following occurred:)

Mr. Lasky: I offer as Exhibit 9 the original deposit tag in the Lofendo account dated November 10, 1948, for \$113,216.50.

The Court: It is admitted in evidence.

(The deposit tag referred to was thereupon received in evidence and marked Defendant's Exhibit 9.)

Mr. Lasky: There was a reference here to the Collection Letter, which was put in as a Plaintiff's Exhibit, but I believe Mr. Erskine got it in as a Defendant's Exhibit in the last half hour. I will put in the Defendant's Exhibit number if you tell me what it is.

Mr. Erskine: That is the Collection Letter.

Mr. Lasky: The original Collection Letter.

The Clerk: That is Defendant's Exhibit G.

The Court: That has already been admitted in evidence.

Mr. Lasky: The next one is a letter of November 18, 1948, from Mr. LeRoy to the Bank of America, being the letter written in the Bank of America's offices. That is to go in as Plaintiff's Exhibit 10.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 10.)

Mr. Lasky: If the Court please, because there is going to be testimony around this, I would like you to indulge me permit [244] me to read a passage from it. If I may do so:

"A Collection Letter of the East Bakersfield Branch (No. 419) of the Bank of America N. T. & S. A., No. C-419-4768, containing the following checks of the United Produce Company, endorsed 'Frank C. Lofendo,' and then there is a list of six checks and I do not need to read them. The numbers, "totaling a \$113,216.50 was received by us on November 15, 1948, and, in error, and advice of credit for the items was mailed on November 16, 1948. The items numerated above totaling \$113,216.50 are not being accepted by us and will be returned to the East Bakersfield Branch (No. 419) of the Bank of America N. T. & S. A., and this letter will serve as your authority to return credit advice which was sent to you in error

and which has not yet been received by your East Bakersfield Branch, without action."

Mr. Erskine: Will you pardon me one second? The date in the letter, November 16, as the date of mailing the advice, is incorrect.

Mr. Lasky: It seems to be incorrect, but we stipulated to the date of mailing.

Mr. Erskine: Therefore I want it understood that when I stipulate to the letter, I am not stipulating to that statement in it.

Mr. Lasky: You are not stipulating to anything in the letter, that is true. You are merely stipulating that the letter was written. [245]

The Court: Yes.

Mr. Lasky: The next Exhibit is a letter dated November 18, from the Bank of America, from Banks and Bankers department, San Francisco Headquarters, by Mr. Roland T. Duncan, Assistant Vice President, over his signature, to Mr. F. E. Etribou, Manager, East Bakersfield Branch (No. 419), Bakersfield, California, and that goes in as Plaintiff's Exhibit No. 11.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Erskine: That is correct what Mr. Lasky said; I am not, of course, stipulating to any of the facts in the letter, just the fact that the letter is written, that is all. I should say any of the statements, not facts.

Mr. Lasky: That is true of any document. We stipulate it is a document but not to its contents.

Mr. Erskine: I do not know. The contents of some of these documents is stipulated to, isn't that right?

The Court: The documents speak for themselves in any event.

Mr. Erskine: Yes, what is in the documents.

Mr. Lasky: I do not think there is any misunderstanding on this. I would like to read this letter which is short addressed to Mr. Etribou:

“Dear Mr. Etribou:

“This is to confirm our various telephone conversations of today. I am enclosing a signed copy of a letter given [246] to us today by Mr. A. R. LeRoy, Vice President of the Merchandise National Bank, Chicago, Illinois. The original we are maintaining for our files.”

Now, Mr. Erskine, we have stipulated that the letter last placed in evidence is the original.

Mr. Erskine: That is right.

Mr. Lasky: “I believe you will find the letter to be self-explanatory.

“During your telephone conversation this afternoon with Kenneth M. Johnson, Assistant Counsel of our Legal Department, you were informed of our bank's position in this case, namely, we must recognize their instructions.

“Mr. LeRoy will have called on you tomorrow before you receive this letter. From what he told me today, it does not look too encourag-

ing for them and any assistance you are able to give him will certainly be appreciated.

“Every indication points to your office coming out O.K., and from what you said, my hat’s off to you. For your information, I just finished talking to our Fresno Office and everything appears to be in the clear there also.

“Regards.

“Sincerely,

“ROLAND T. DUNCAN,

“Assistant Vice President.”

Now, in the margin opposite the words “we must recognize their instructions,” there is a pencil arrow pointing to those [247] words, and then in the margin is handwriting in pencil: “Like hell I will,” initialed N.B. Will you stipulate that Mr. Etribou wrote that on there sometime in the afternoon of November 19?

Mr. Erskine: I do not know whether it was the afternoon, but he wrote it on there. He received the letter at 2:15 in the afternoon, and so he wrote it sometime after that.

Mr. Lasky: After that. The next exhibit is a memorandum dated October 22, 1948, by I. N. Tarr, Assistant Cashier-Chief Clerk, East Bakersfield, letters so marked as Plaintiff’s Exhibit 12.

(The document referred to was thereupon received in evidence and marked Plaintiff’s Exhibit 12.)

Mr. Lasky: This is short and I would like to read it also:

“Subject: United Produce Co. and Frank C. Lofendo

“It has been brought to my attention of unusual operations between the two subject parties. Frank Lofendo, who has an account at this Branch, has been making deposits consisting of checks drawn by United Produce Company on Merchandise National Bank, Chicago, Illinois. The amounts have been averaging medium five figures and seem to be gradually increasing. Upon checking the canceled checks of Mr. Lofendo, we find that the majority of checks in medium five figures are made payable to the United Produce Company.

“A few days ago, I wired Merchandise National Bank asking for the financial responsibility and the top limit for acceptance of [248] checks on the United Produce Company. Their response was that they loaned them legal limit on secured basis. Net worth of the Company was over \$80,000.00 and that they could not set a limit on acceptance of checks and suggested that we contact our Fresno Main Office, who have complete information on the Company. Mr. Nelson of Fresno Main Office has been contacted and the information that he gave us was no more than what was contained in our wire response.

“This has been taken up with Mr. Etribou, Manager, and he has given instructions that we do not accept these checks for immediate credit until such time as Mr. Lofendo can be con-

tacted and his method of operation discussed.

"At the present time Mr. Lofendo is in Chicago and is expected to return in about two weeks.

"I. N. TARR,

"Assistant Cashier-Chief  
Clerk."

initialed by Mr. Etribou, by Cosgrove, and by two other gentlemen whom I assume you will stipulate were officers of the Branch.

Mr. Erskine: Yes. I do not know their names.

Mr. Lasky: Their identity is not important. They were four officers of the Branch, including Manager Etribou and the Assistant Manager, Mr. Cosgrove.

The next in evidence is a memorandum from the East Bakersfield Branch, which is even shorter, dated November 15, 1948, and it is to go in as Plaintiff's Exhibit 13.

(The document referred to was thereupon received in evidence [249] and marked Plaintiff's Exhibit 13.)

Mr. Lasky: I would like to read this:

"East Bakersfield, Nov. 15, 1948.

"Subject: Frank C. Lofendo

"This is in further reference to the activities and operations of the account of Frank C. Lofendo. Shortly after the last memorandum, Mr. Lofendo flew from Chicago with the President of United Produce Company. The matter of his deposits and checks drawn against his

account was discussed with Joseph V. Cosgrove, Assistant Manager.

“It was my understanding, as a result of this conversation, that it had been agreed that he, Mr. Lofendo, would not draw against his deposits until such time as the items would be cleared. Also, he would endeavor to increase the balance of his account. The account at present appears to be used as a clearance account between United Produce Company and himself. Mr. Cosgrove was apparently satisfied with this arrangement.

“This matter was again re-discussed at our Officers’ meeting on Wednesday, November 10th, and at that time, Mr. Etribou insisted that all items deposited should be cleared before credit is allowed.

“Upon complying with this request, it has been necessary to return many checks for the reason ‘drawn against uncollected funds.’ As a result, we have had many long distance calls from Chicago, Philadelphia and San Francisco concerning these. [250]

“I. N. TARR,

“Assistant Cashier-Chief  
Clerk.”

initiated by Mr. Etribou and by three other officers of the Branch. Correct?

Mr. Erskine: That is right.

The Court: You are filling in those numbers on the stipulation?

Mr. Lasky: I have been writing them in. I suggest that this stipulation, which we deem signed, perhaps should be given a number to identify it or transposed into the record to become evidence in the case?

The Court: Yes, it might be better to give it a number and accept it in evidence as the stipulation of the parties.

(The stipulation referred to was thereupon received in evidence and marked Plaintiff's Exhibit 14.)

Mr. Lasky: Mr. Erskine, I assume the other stipulations we discussed this morning you are not prepared to act on?

Mr. Erskine: No, I have not been able to check them yet.

Mr. Lasky: If your Honor wishes me to call a witness, I will do so.

Mr. Erskine: May I say this, I have to try to prepare that stipulation we discussed this morning, and I told the stenographer I would be at the office to start dictating it. It is a rather difficult document. In addition to that I have been suffering with sinus trouble; I cannot do much night work.

The Court: The Court will adjourn until 10:00 o'clock [251] tomorrow morning. [251-A]

June 20, 1950—10:00 A.M.

The Clerk: Merchandise National Bank vs. Bank of America on trial.

Mr. Lasky: I would like to inquire of counsel,

before we proceed with any further witness, whether we can get clear the further stipulations we were discussing yesterday morning. I would like to get them in evidence.

Mr. Erskine: There was the Lofendo and the Gassman—

Mr. Lasky: And then there was the further one.

Mr. Erskine: There is going to be a little change here.

Mr. Lasky: You were to give me a revision of a paragraph or two.

Mr. Erskine: I have not done that yet. I was extremely busy getting out that other stipulation. I dictated it quite late yesterday evening and I did not have a chance—you know, the one, the dictation of which I was to undertake?

The Court: How about the Gassman and the Lofendo?

Mr. Erskine: I did not check those myself yet. I was working out what I have just stated and other phases of the case, but I asked Mr. Tobey to check them and he seems to think they are all right. I know they seem to be all right with me, and I know we will have no trouble about them, but I should have an answer tomorrow morning on those, on all of them.

The Court: I was hoping we would be through with the [252] Plaintiff's case by tomorrow morning. Can you proceed?

Mr. Lasky: Yes, I can proceed.

The Court: Let us proceed.

Mr. Lasky: Mr. Etribou, will you take the witness stand?

The Court: You know, even with your fine efforts shortening this trial, it looks to me like it is drawing on, and as I told you sometime ago, I am faced with the Judicial Conference that is scheduled here for next week and then I am faced with the desire to go home after that. If there is any doubt in your minds at all as to whether we will finish the case this week, I think that I will start calling Court at 9:00 o'clock in the morning, and we will work later on in the afternoons.

Mr. Lasky: I would think it would be desirable to do so, because while I do not think I have much more—and in fact to date I have spent only about an hour and a half in the whole trial interrogating witnesses—

The Court: Yes.

Mr. Lasky: —still I do not know how long the cross-examination will take, and I would be prepared to come earlier or work later, because these things have a habit of drawing out beyond what we anticipated.

The Court: Yes.

Mr. Erskine: That would be all right with me. I am not as vigorous a man as my friend here.

The Court: I think we could spend five or six hours a day. [353]

Mr. Lasky: I might say as a result of our discussion in chambers yesterday, I touched upon a point and I dropped it at the time, and on further thought I drafted a proposed stipulation that I

thought would get something out of the way, and at sometime during the day I think we might treat that, too.

**FRANK ESTRIBOU**

previously called as a witness on behalf of the Plaintiff under Rule 43(c), having been previously sworn, testified as follows:

**Direct Examination**

By Mr. Lasky:

Q. Mr. Etribou, just preliminarily, you are the Manager of the East Bakersfield Branch of the Bank of America? A. That is correct.

Q. Mr. Etribou, on November 17, 1948, you recall you had a telephone conversation with Mr. Messenger? A. I did.

Q. In that telephone conversation it is a fact that Mr. Messenger asked about the Lofendo Account? A. That is correct.

Q. And the two of you over the telephone compared a list of checks and items that had cleared through your Bank?

A. That is also correct.

Q. In that telephone conversation he sounded to you as if he was excited and in trouble, is that correct? [254] A. Correct.

Q. And you knew there was something wrong?

A. I had an idea from his conversations there must have been something wrong on his end.

Q. And he did in that telephone conversation tell you that he was rescinding the advice of Credit for the \$113,216.50? A. He requested that I do so.

(Testimony of Frank Etribou.)

Q. Did he not tell you that he was doing so?

A. No.

Q. Now, on November 18, the next day, you had a telephone call from Mr. Duncan at the Headquarters Office? A. That is correct.

Q. You also had one from Mr. Kenneth Johnson of the legal department of your head office in San Francisco? A. Yes. [255]

Q. Now, on November 18th, the next day, you had a telephone call from Mr. Duncan at the headquarters office? A. That is correct.

Q. You also had one from Mr. Kenneth Johnson of the legal department of your head office in San Francisco? A. That is also correct.

Q. And in those two phone conversations the six checks totalling \$113,000 were discussed, were they not?

A. Are you referring to both conversations?

Q. Yes, both conversations.

A. Yes, but I referred Duncan's call to my chief clerk Tarr, inasmuch as I would have to get the information from him.

Q. Duncan called you earlier in the day and Mr. Johnson called you later in the day?

A. I can't recall the exact time but I did have such conversations.

Q. It is a fact, is it not, that when Mr. Kenneth Johnson telephoned you during the course of the day on November 18th that he told you that Mr. Duncan and Mr. LeRoy of the Merchandise National Bank were at his desk, that they had dis-

(Testimony of Frank Etribou.)

cussed the \$113,000 in checks, and Mr. LeRoy had said that the advice of credit had been sent out in error and that the checks had not been paid?

A. I think that is correct.

Q. Mr. Duncan also said to you that Mr. LeRoy had informed him that Mr. Messenger had told that to you in the telephone conversation [256] the day before?

A. Well, we discussed it in detail. I don't know whether he told me it was an error, but I think he did.

Q. The particular question I asked of you was this, that Mr. Duncan did say to you that he understood from Mr. LeRoy that on the day before Mr. Messenger had told you that in the telephone conversation, namely, that Mr. Messenger had told you that the advice of credit had been sent out in error and that the checks had not been paid?

A. I think that is correct.

Q. Now, Mr. Johnson also told you in that telephone conversation that Mr. LeRoy on that day, November 18th, had rescinded the advice of credit, and Mr. Johnson told you that you were to honor the rescission?

A. I think that is what the letter said, yes.

Q. Of course his letter said that, but he also said that in the phone conversation?

A. I think that is what he said, thought we ought to go along with him, or words to that effect.

Q. You did not receive the letter, of course, until the next day? A. That is correct.

(Testimony of Frank Etribou.)

Q. Mr. Johnson also told you it was the position of the head office of the Bank of America that you were to follow Mr. LeRoy's instructions and return the advice of credit? He told you that [257] that was the position of the head office?

A. I think he requested that I do so.

Q. Yes, and he further told you that that was the position of the head office, did he not?

A. That is pretty hard to remember that.

Q. Perhaps your memory is not so good as it was at the time of your deposition, so I call your attention to page 115, the top of 116:

"A. He said he would like to have me do it.

"Q. It says here—all right. That is what he advised you? A. Yes.

"Q. That was the position of the head office—"

Mr. Erskine: What are you reading?

Mr. Lasky: I am sorry. The top of page 116. I will read it over again.

"A. He said he would like to have me do it.

"Q. It says here—all right. That is what he advised you? A. Yes.

"Q. That was the position of the head office. A. That is right."

Q. That is correct, is it not?

A. If I so testified, that is it, yes.

Q. And, of course, at that time the \$113,000 had not yet been [258] credited to Lofendo's account. This is on the 18th we are talking about.

(Testimony of Frank Etribou.)

A. That is correct.

Q. Now, on the 19th, the next day, Mr. LeRoy called on you at the East Bakersfield branch, did he not?

A. I believe it was the following day, yes.

Q. When he called on you he arrived about 2:30 or thereabouts in the afternoon?

A. After the bank was closed.

Q. Much later in the day?

A. Oh, I would say around four o'clock.

Q. That late on the 19th?

A. I think so. The bank was closed. I still had a couple of customers at my desk. I remember distinctly.

Q. Mr. LeRoy told you at that time, did he not, when he arrived at the branch that he wanted to discuss the \$113,000 matter with you.

A. He said he wanted to discuss the Lofendo case, yes.

Q. You refused to talk to him about it?

A. I told him there wasn't anything to talk about so far as I was concerned.

Q. You declined to talk to him about it?

A. That is correct.

Q. Furthermore, you told him you did not know any reason why you should discuss the matter with him since he had been up in [259] San Francisco and had discussed it with your head office?

A. That is right.

Q. You told him that? A. That is right.

Q. At that time, when you told him that, you

(Testimony of Frank Etribou.)

had already received that letter that Mr. Duncan wrote you, marked Plaintiff's Exhibit 11 in this case, which I show you?

A. It was received November 19th about two o'clock.

Q. So that if you talked to Mr. LeRoy later in the day, you had already received this letter when LeRoy arrived?

A. That is right, if he arrived on the 19th.

Q. He arrived on the 19th. That is a fact, is it not, he arrived the day after you had the phone call with Mr. Duncan?

A. I think that is correct.

Q. And Mr. Johnson. So that at the time Mr. LeRoy called at your office, you already knew that the head office in writing had instructed you to follow Mr. LeRoy's instructions about the advice of credit, is that right.

A. That is right.

Q. And yet you told Mr. LeRoy that the reason you would not talk to him was there wasn't any point to it because he had already discussed the thing in San Francisco, is that right?

A. That is right.

Q. You meant by that, I assume, that whatever San Francisco had said on the subject was it? [260]

A. No, I wouldn't mean that.

Q. What did you mean by it?

A. Just exactly what I said. [260A]

Q. Well, can you explain further to me what

(Testimony of Frank Etribou.)

you meant by telling him that there was no point in talking to him, since he had been talking to San Francisco?

A. He had already seen fit to discuss the affairs of my branch with my head office.

Q. And you didn't tell him at that time that you were not going to follow the instructions of your head office, did you? A. No, I didn't.

Q. Well, now, how long after Mr. LeRoy arrived in your branch did you telephone to Mr. Schilling?

A. I didn't telephone to him.

Q. Did he telephone to you?

A. That is correct.

Q. And when was it he telephoned to you?

A. That would be pretty hard to remember. It was prior to that time—I think he was in the bank at the time.

Q. Well, now, let's identify Mr. Schilling. He was in the legal department of your bank at the headquarters, I mean, by "your bank" the Bank of America? A. That is correct.

Q. And he is also vice president of the Bank of America? A. I think that is his title.

Q. Yes. Now what time of the day was it that he telephoned with relation to the time that Mr. LeRoy came there, either before or after? [261]

A. LeRoy was in the bank at the time. I didn't know the gentleman, but I assumed that is who it was.

Q. I see. So Mr. LeRoy was in the bank, you hadn't yet talked to him and he was standing there

(Testimony of Frank Etribou.)

waiting while you were having a phone call with Mr. Schilling?

A. He was pacing up and down the lobby.

Q. While you were talking to Mr. Schilling, is that right?

A. Well, the phone call came while he was in the lobby, yes.

Q. Yes. And before you talked to Mr. LeRoy?

A. That is correct.

Q. And you say Mr. Schilling put through that call to you? A. That is correct, yes.

Q. And did Mr. Schilling in that telephone call tell you that because of the wire from the Continental Illinois National Bank which had been referred to in this case, which had arrived the evening before, you were not to talk to Mr. LeRoy?

A. You generally follow your attorney's instructions.

Q. But is that what he told you?

Mr. Erskine: What was that? May I have that read?

(Record read.)

Mr. Lasky: Of course the answer is not responsive.

Q. Did Mr. Schilling so tell you that?

A. Well, he didn't mention anything about a wire; he told me not to discuss the case with him.

Q. And did Mr. Schilling in that conversation tell you that [262] you were to—that they were going to charge Merchandise Bank's account in

(Testimony of Frank Etribou.)

San Francisco with \$113,000 and that you were to pass credit to the Lofendo account?

A. I told him I had done so.

Q. You told him that you had done so?

A. That is correct.

Q. And what time of the day on the 19th had you done that?

A. Well, the advice of charge, I think, will indicate the time that we received the advice, and it was made shortly after that, maybe 15 or 20 minutes.

Q. The advice charge?

A. The advice of credit.

Q. Well, now, we have stipulated that the advice of credit arrived at your office in Bakersfield on the morning of the 19th. Do you mean to say that as soon as it arrived, you put through a debit—rather, a credit to the Lofendo account?

A. I made a debit and incidentally credited the account. I didn't make it—I instructed my chief clerk to do so.

Q. At that time when you did that, you had already heard from Mr. Johnson the day before that you were to follow Mr. LeRoy's instructions and return the advice of credit, is that right?

A. He didn't say anything about returning it.

Q. Well—

A. Said he thought we should go along with them and rescind [263] the credit.

Q. Well, then, when the letter arrived—

Mr. Lasky: Will your Honor let me have that letter, please? Thank you.

(Testimony of Frank Etribou.)

Q. (Continuing): When the letter arrived, how soon after it arrived did you write in the margin here these words, "Like hell I will"?

A. Well, that would be more or less of a guess.

Mr. Erskine: What was that last answer?

(Record read.)

Q. (By Mr. Lasky): You mean to say, however, Mr. Etribou, that you were already ignoring these instructions, and yet when the letter arrived you put that statement in the future tense?

A. Oh, I meant just exactly that.

Q. Well, I put it to you, Mr. Etribou, that in fact you had not done anything with the advice of credit until after you talked to Mr. Schilling in the afternoon; now isn't that right?

A. Oh, I had already made up my mind about that.

Q. And when Mr. LeRoy arrived there late in the afternoon, you refused to talk to him, but you didn't tell him that you had already put the advice of credit through and acted upon it?

A. I didn't tell him that, no.

Q. I see. Now when you talked to Messenger on the 17th, Mr. Messenger on the 17th, you had learned from his telephone conversation, of course, that the advice of credit had been sent out? [264]

A. That is correct.

Q. Although you hadn't yet received it?

A. He asked me if I had received it.

Q. You hadn't?

(Testimony of Frank Etribou.)

A. I told him that I didn't know, because it was late in the afternoon and had he sent it out on the 15th, it should have been in our office on the 17th—had it been properly directed.

Q. But in fact, of course, you hadn't yet gotten it? A. No, I didn't know that at the time.

Q. Now you deduced from what he said that an advice of credit had been sent out, that on the day when it was sent out, the 15th of November, as he told you, the Merchandise Bank had also put through the various entries on their own books corresponding to the advice, namely, a charge against the United Produce account and a credit in their own record in the Bank of America's account. You assumed all that, did you not?

A. Our head office was credited for us, yes.

Q. And you assumed that those things occurred—

Mr. Erskine: Pardon me. I couldn't quite hear. Would you speak a little louder, Mr. Etribou?

(To the Reporter.)

Would you read that back, please?

(Record read.)

Q. (By Mr. Lasky): My question is, you assumed from what Mr. Messenger said that all those things had occurred on the 15th?

A. That's right. [265]

Mr. Erskine: All what things, counsel?

Mr. Lasky: The entry of an item in the United Produce Company's account on the books of the

(Testimony of Frank Etribou.)

plaintiff, and an entry in the ledger sheet of the Bank of America on Merchandise's books.

Q. You understood the question, did you not, Mr. Etribou? A. Yes, I did.

Q. How does it happen, then, that at that time you did not then put through an entry to the credit of Lofendo and request San Francisco to charge Merchandise's account?

A. Well, that isn't the procedure that is followed.

Q. What is the procedure that is followed?

A. Generally wait until you receive the advice of credit.

Q. And that is true in case of any item that has gone out from your bank on a collection letter, is it not?

A. No, unless you have telegraphic advice.

Q. Well, on your collection letter you will state whether or not you want telegraphic advice?

A. That is correct.

Q. You had not so requested in the case of the \$113,000? A. I don't think I did so.

Q. Well, whether you did or not will appear on the face of the collection letter, will it not?

A. I think it is a sticker that appears on the item itself, rather than—— [266]

Q. Well, I show you the collection letter that was sent, so there will be no doubt about it. Defendant's Exhibit G. This did not request advice by wire, but it says "Advise non-payment by mail"; is that right? A. That is correct.

(Testimony of Frank Etribou.)

Q. So that in the case of collection letters, unless you have requested advice by wire, you never enter any credit upon the basis of it or make any entries upon the basis of it until you have received the advice of credit in hand, is that right?

A. I didn't make it in this case.

Mr. Lasky: Will you read that answer, please?

(Record read.)

Q. (By Mr. Lasky): The question is, you never make such entries on a collection until you have got the advice of credit in hand?

A. I won't say that, because we might have a phone call advising us to pay. Naturally I would make the entry then.

Q. Well, now, in this case on November 17th you had a phone call advising you that the advice of credit had been sent out and you assumed from that that all the appropriate entries had been made on Merchandise's books? A. That is correct.

Q. Why did you not then enter your entries upon the basis of that?

A. Well, there was no particular reason for making it at that time. [267]

Q. You didn't do it because it isn't the practice to do it until you get the advice of credit in hand; now isn't that right?

A. No, I still do it. We could do it for any reason. Might be a dozen reasons for us doing it other ways.

Q. You also didn't do it because Mr. Messenger told you it was revoked?

(Testimony of Frank Etribou.)

A. He said he would like to have me revoke it, yes.

Q. Well, now, Mr. Etribou—

Mr. Lasky: Mr. Erskine, will you let me have the original of Etribou Exhibit 5-C for identification? And while Mr. Tobey is finding that, I will proceed.

Q. The fact is that it was not the custom or practice of your branch in your dealings with Merchandise National Bank to instruct the head office to charge Merchandise's account until a written authority to do that was in hand received from Merchandise, isn't that a fact?

A. Would you mind reading that again?

Mr. Lasky: Yes, I will be happy to. Would you read that?

(Record read.)

A. We will never pass entry until we have an advice of credit, yes.

Q. Yes, until you get it. And as a rule, you have to have something to support any entry of that sort, and it was always the practice to wait until some written instruction was received from Merchandise on collection items before passing credit to [268] the customer and instructing the head office to charge Merchandise? A. That is correct.

Mr. Lasky: Yes. Now do you have that slip, please?

Q. Now, Mr. Etribou, I show you here a little slip of paper—

(Testimony of Frank Etribou.)

Mr. Lasky: If the Court please, it was marked Plaintiff's Exhibit 5-C for identification on the Etribou deposition, so I assume it is adequately identified for purposes of questioning the witness.

The Court: Very well.

The Clerk: Our mark is on the back of it.

Mr. Lasky: You haven't marked this yet.

The Clerk: Oh.

Q. (By Mr. Lasky): I show you here a little slip of paper purporting to be a deposit tag, all typed out, "Frank C. Lofendo," dated "11/19/48," for \$113,216.50, "proceeds of Collection No. 419-476," with a stamp on it.

Mr. Lasky: The Court might wish to glance at that slip first (document examined by Court).

Q. (Continuing): Now, Mr. Etribou, looking at that paper, this little slip was prepared in your branch, wasn't it?

A. I will take a look at it (examining). Yes, it was made out by one of our collection tellers.

Q. Yes, and it was made out on the 19th, wasn't it? [269]

A. That is the date on there, yes.

Q. And what time of the 19th?

A. Oh, I couldn't tell you that.

Q. Well, now, is it customary on collection items to prepare a brand new deposit tag in order to enter a paid entry?

A. If they have some sort of a credit.

Q. Quite true. And isn't the usual thing to take

(Testimony of Frank Etribou.)

the deposit tag that has come in from the customer when the item came into the bank and use it?

A. Not necessarily.

Q. Isn't it the usual thing? I didn't ask you whether it was necessary. Isn't that your usual practice?

A. If it comes in for collection, as a rule you don't have a deposit tag.

Q. Well, you always did it in the Lofendo matters, did you not?

A. They were treated, they attempted to treat them as cash, yes.

Q. Well, I didn't ask you that. I have asked you a physical question.

A. I couldn't answer that, because I don't handle them. I don't handle it.

Q. Well, all right. Now I show you here a little slip that has already been marked in evidence as Plaintiff's Exhibit 9 (handing to witness), a carbon copy, and that has been stipulated — [270]

Mr. Lasky: — to by Mr. Erskine, has it not, Mr. Erskine, as No. 9, to be a carbon copy that came in with the \$113,000 when it first came into the bank?

Mr. Erskine: Let me see it, will you?

Mr. Lasky: If it hasn't been so stipulated, I will ask you to, because it is so shown by the depositions. Comes from your records.

Mr. Erskine: I don't know as I stipulated to it.

Mr. Lasky: Then I request you to do so.

Mr. Erskine: That it is a carbon copy?

(Testimony of Frank Etribou.)

Mr. Lasky: It is the duplicate, of the deposit tag that came in through the mail to Bank of America when the \$113,000 came in on the 13th day of November.

Mr. Erskine: Yes, all right, that is stipulated to.

Mr. Lasky: All right.

Q. Now, Mr. Etribou, your bank had in its possession on November 19th this deposit tag which is marked Plaintiff's Exhibit 9, dated November 10th. How does it happen that it was not that ticket that was used as the basis of your entry instead of your branch preparing a brand new one?

A. I still can't answer that, because I had nothing to do with passing the entry.

Q. Well, I ask you if this isn't a fact, that the original of the deposit tag of which Plaintiff's Exhibit 9 is a carbon copy was, on the 18th, after your conversation with Mr. Johnson, [271] stamped as unpaid and returned rejected, and then destroyed the next day? A. I couldn't answer that.

Q. You know nothing about it?

A. I don't know. I don't handle items of that kind. That isn't part of my duties.

Mr. Lasky: All right, I ask that the document marked Plaintiff's 5-C for identification on the Etribou deposition be marked as Plaintiff's exhibit next in order.

The Court: Very well.

The Clerk: Plaintiff's Exhibit 15 in evidence.

(Testimony of Frank Etribou.)

(Whereupon the deposit tag previously marked Etribou 5-C, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 15.)

Q. (By Mr. Lasky): Now when you had your telephone conversation with Mr. Schilling on the 19th, in the afternoon, did you tell Schilling that you intended to pass entry on the books of \$113,000?

A. No, I think I told him that I had already passed it, and I was going to stand on it.

Q. All right, I call your attention to your deposition, beginning on page 103, line 22:

“A. I think I put in a call myself to Schilling.

“Q. Was that while LeRoy was there or before?

“A. It was before.” [272]

Now was it before or while Mr. LeRoy was in the lobby?

A. Oh, it was before, because the entry was made prior to, before 3 o'clock.

Q. I am not asking you about the entry.

Mr. Lasky: I move that go out.

A. All right, what is your question, then?

Q. I am asking you whether the phone call was put to Mr. Schilling, before LeRoy arrived, as you say, in the deposition, or while he was in the lobby as you said a few moments ago?

A. It was before.

(Testimony of Frank Etribou.)

Q. But it was still going on while he was in the lobby? A. That is not the case.

Q. Well, did you not testify only a few moments ago that Mr. LeRoy was in the lobby while you were talking to Mr. Schilling?

A. But it was Schilling's phone call.

Q. It was Schilling's phone call?

A. That's correct.

Q. Oh, had you two phone calls with Mr. Schilling that day?

A. I assume that that is the case, yes; pretty hard to remember that far back.

Q. Well, how early in the day had you called Mr. Schilling?

A. It was prior to that time. I am certain of that.

Q. You called him early in the morning?

A. Might have been any time.

The Court: Let me get this straight, now. Were there [273] two telephone calls between you and Mr. Schilling on that day?

A. Your Honor, there were so many phone calls, it is pretty hard to remember all of them.

Q. Well, are you testifying as to whether there are two or one? How many?

A. I know that there was more than one phone call with Schilling.

The Court: All right.

Q. (By Mr. Lasky): Well, now, Mr. Etribou, I will continue with this deposition:

"Q. What did Mr. Schilling tell you?"

"A. Oh, I just discussed it."

(Testimony of Frank Etribou.)

And then continuing on page 104, line 10, Mr. Erskine:

“I merely asked him about my position and told him what I intended doing.

“Q. You told Mr. Schilling?

“A. Regardless of what had taken place.

“Q. And what did you tell him you intended to do?

“A. Pass the entry on my books.”

Now is that correct? Did that happen?

A. That was the first phone call; that was my phone call to him.

Q. And how early in the day was it?

A. That I couldn't tell you. I know it was before the bank closed, shortly after receiving the advice of credit. [274]

Q. And then I understand you to say that when Mr. LeRoy was there, you got a phone call from Mr. Schilling in which you discussed the same thing over again?

A. No, I didn't. He asked if Mr. LeRoy had called on me as yet, and I told him no, but there was a gentleman in the lobby and I assumed that he was Mr. LeRoy—which later proved to be him.

Q. Well, now, when you talked to him earlier in the day and you told him you intended to pass the credit, did he tell you then that Mr. LeRoy was coming down? A. No, he didn't tell me that.

Q. Didn't mention that?

A. No; I was calling him.

(Testimony of Frank Etribou.)

Q. And then he called you back later?

A. That's right.

Q. And told you not to talk to LeRoy when he got there? A. That's right.

Q. And in one of your conversations with Mr. Schilling, you told him you intended to pass the credit regardless of what had taken place?

A. That's right.

Q. And what did you refer to by the "regardless of what had taken place"? I will withdraw the question.

By "regardless of what had taken place," you referred to the fact that Mr. Messenger in his phone call with you on the [275] 17th told you the advice was revoked, and you also referred to the conversations between Mr. Duncan and Mr. LeRoy and Mr. Johnson on the 18th, and Mr. Johnson's telephone call to you, in which he told you you were to follow Mr. LeRoy's instructions about the revocation of the advice of credit. Those are the things you referred to, are they not?

A. I referred to any commitments that may have been made by anyone in reference to that particular item.

Q. Yes, any commitment made by anyone on the behalf of the Bank of America with regard to that rescission? A. In behalf of my branch.

Q. Yes. At that time you were aware that such a commitment had been made?

A. From the communications, yes.

Q. And the fact is, Mr. Etribou, what made

(Testimony of Frank Etribou.)

you change your mind, decide to seize advantage of that advice of credit, was the receipt of that wire from the Continental Illinois National Bank late on the 18th, which awoke you to the fact that some one in your branch had violated your instructions and had given immediate credit to the Lofendo account on some other checks. Isn't that right? And that you were suffering the loss as a consequence of that mistake?

A. I determined that, we found out that we had an overdraft in the account, and naturally we passed the entry.

Mr. Lasky: I move to strike out "and naturally we passed [276] the entry."

The Court: Well, it is just an explanation of his answer.

Mr. Lasky: All right, very well.

The Court: As he views it.

Q. (By Mr. Lasky): And the whole purpose of your crediting the Lofendo account with the \$113,000 was to get funds into that account so you could cover up the \$97,000 overdraft?

A. That is one reason.

Q. Now it is a fact—well, I will withdraw my intended question.

I show you here, Mr. Etribou, the document that was marked, that is in evidence as Plaintiff's Exhibit No. 12. This is a memorandum of October 22nd to Mr. Tarr. I want you to look at it so you are familiar with it, before I ask any questions on it.

A. I have seen it.

(Testimony of Frank Etribou.)

Q. You have initialed it?

A. That is correct.

Q. Now on October 22nd, you saw it?

A. I saw that document?

Q. Yes. A. Yes, that's right.

Q. Yes. And when this states in here that "Mr. Etribou has given instructions that we do not accept checks in the Lofendo account for immediate credit until such time as Mr. Lofendo [277] can be contacted and his method of operation discussed," that is the fact on that date; you did so instruct your branch officials? A. That is correct.

Q. And at that time you discussed with your branch officials, with Mr. Tarr—by the way, who is Mr. Tarr?

A. He is our chief clerk and operations officer.

Q. And Mr. Cosgrove is your assistant manager?

A. Assistant manager.

Q. You discussed with them at that time that there were unusual operations going on between United Produce Company and Frank C. Lofendo?

A. It was brought to my attention by Tarr.

Q. Yes? A. First.

Q. Yes. And then you discussed it?

A. That's right.

Q. And it was discussed that checks in large amounts were coming in to the account from United Produce Company and large amounts of checks were going out to the United Produce Company? That was discussed?

(Testimony of Frank Etribou.)

A. I requested they bring the checks to me and I examined and determined that, yes.

Q. And after determining that, seeing that to be the fact, you considered that a most unusual situation? [278]

A. Due to the size of the checks and the activity, yes, it was.

Q. Yes. And now—

Mr. Lasky: Now, at this point I want to make use of some documents which were going to be covered by stipulation, and I assume counsel will permit me to do so even though the stipulation has not yet been approved. I have before me, Mr. Erskine, your S.P.M. 214. I will request you for a stipulation at this time that that is one of the rules and regulations of the Bank of America and was one at the time of this, in November of 1948.

Mr. Erskine: Yes, that is right.

Mr. Lasky: So stipulated. And I will offer it in evidence as Plaintiff's next in order.

The Court: Very well.

The Clerk: Plaintiff's Exhibit 16 in evidence.

(Whereupon document referred to above as S.P.M. 214, Bank of America, was received in evidence and marked Plaintiff's Exhibit No. 16.)

Q. (By Mr. Lasky): Now, Mr. Etribou, you were aware of the fact that in October of 1948 it was a rule of your bank that branch managers are expected to watch their deposit accounts, that de-

(Testimony of Frank Etribou.)

positors must not be permitted to habitually overdraw their account or to use them for kiting and the like transactions, that branch managers should arrange for closing of depositors' accounts when the depositor persists in issuing [279] checks which must be rejected to avoid overdrafts, in kiting, in drawing against uncollected funds or in other practices which are dangerous to the bank. You were acquainted with that rule? A. I am.

Q. And were acquainted with that rule. And with your acquaintance with that rule, you discussed the subject matter on October 22nd with your branch officers and issued the instructions that Lofendo was to be brought in and no checks brought against his account were to be given credit, until collected; is that not right?

A. I think that is correct. [280]

Q. Now, when those facts on October 22, were brought to your attention, to wit, the great number of checks coming into the Lofendo account, the large size of the checks, being in five figures, the fact that a great many checks in five figures were going out, the fact that checks were coming into Lofendo from United Produce Company and going out to United Produce Company from Lofendo, when these facts were called to your attention there, you appraised them in the light of your twenty-five years of experience in banking, did you not?

A. I what?

Q. You appraised these facts?

A. Yes.

(Testimony of Frank Etribou.)

Q. And as a consequence you suspected that there was a check kiting operation going on?

A. No, I did not suspect a check kiting operation.

Q. Well, Mr. Etribou, I call your attention to your deposition, page 20, beginning on line 3. Perhaps so the connection will be clear we will start on page 19, line 18. What was there about the facts as you saw them in this memo—and the memo, I guess you will stipulate, Mr. Erskine, I was there referring to was this memo of October 22?

Mr. Erskine: Yes, all right.

“Q. (By Mr. Lasky): What was there about the facts as you saw them in this memo and as they were related to you by Mr. Tarr which had led you to instruct that checks thereafter deposited in [281] the Lofendo account drawn on out-of-town banks were to be received for collection only?

“A. About twenty-five years of experience has taught me that.

“Q. Well, for the benefit of me, who doesn't have that twenty-five years of experience, what circumstances in that experience led you to that?

“A. Well, I tried to explain that to you. The size of the items and the activity in the account.

“Q. Did you suspect that there may be a check kiting operation?

(Testimony of Frank Etribou.)

“A. Well, my action, I think, perhaps would answer that question.”

You so testified?

A. Apparently I did.

Q. And that is your answer now?

A. No, I did not suspect a kiting operation. I wanted to say I would rather be safe than sorry.

Mr. Lasky: We will let the language of the testimony speak for itself.

Mr. Erskine: I think, counsel, if you read that part of his testimony, you ought to read his other testimony.

Mr. Lasky: We had the same question the other day. The counsel can read anything he wants to.

The Court: Yes, you can bring that out, counsel. Mr. Lasky does not have to clear up any apparent inconsistencies, that will be up to you.

Mr. Lasky: Now, Mr. Etribou, you are acquainted also with [282] this memorandum dated November 15, which has been marked as Plaintiff's Exhibit 13. Will you look at it to make sure that you do have it in mind? A. Yes, I recall it.

Q. This document you have just referred to, Plaintiff's Exhibit 6, further referred to the activities and operations of the account of Lofendo and refers to the fact that after the last memorandum Lofendo had flown out from Chicago with the President of the United Produce Company, and states, “This matter was again rediscussed at our officers' meeting on Wednesday, November the 10th,

(Testimony of Frank Etribou.)

and at that time Mr. Etribou insisted that all items deposited should be cleared before credit is allowed."

Is it a fact that you did then, on November 10, at an officers' meeting insist that all items deposited in the Lofendo account must be cleared before credits are allowed?

A. The minutes of that meeting I think will indicate that.

Q. Are there minutes of that meeting other than this memorandum? A. Yes.

Mr. Lasky: I asked during the depositions for all documents upon the subject. I thought they had all been supplied. I make the request that if there are such minutes in existence, that they be produced.

Mr. Erskine: I can give you a copy of them.

Mr. Lasky: But meanwhile the witness can answer the question directly. [283]

Q. Did you at that meeting insist that thereafter all items deposited in the Lofendo account should be cleared before credit was allowed?

A. I reiterated my previous instructions, yes.

Q. In other words, that no credit was to be given on any check coming into the Lofendo account until it was actually collected? A. That is correct.

Mr. Lasky: May I have a moment off to look at this document just produced?

The Court: All right.

Mr. Lasky: You have some minutes of November 22, which I do not think we are interested in. It is after the event. It refers to the possibilities of a law suit and the like. May I detach this?

(Testimony of Frank Etribou.)

Mr. Erskine: Yes.

Mr. Lasky: I would like, with the stipulation that those are minutes of the branch of the defendant, to offer it in evidence.

The Court: Any objection?

Mr. Erskine: No objection.

The Court: So stipulated.

(The minutes referred to were thereupon received in evidence and marked Plaintiff's Exhibit 17.)

Mr. Lasky: And it seems short, I would like to read it. [284] The first seems to be an extract of minutes from Wednesday, October 20, which I shall read:

"Tarr, Chief Clerk, stated that he was checking into the financial responsibility of the United Produce Company. Yesterday afternoon he forwarded a wire to Merchandise National Bank of Chicago, Illinois, asking for a statement of financial responsibility of this company and to advise us the top limit of the acceptance of their checks. This matter was brought to his attention upon observation of items being deposited to the account of Frank C. Lofendo. All of his deposits consisting of large checks drawn on the United Produce Company are gradually pyramiding and now amount to around \$100,000. The majority of his own checks are made payable to the United Produce Company. The methods of his operations does

(Testimony of Frank Etribou.)

not seem to be clear. It was suggested he be called in to discuss the matter with us."

And then the meeting of Wednesday, November 10th:

"The matter of Frank C. Lofendo and United Produce Company was rediscussed. Mr. Etribou insisted that all items for deposit should be cleared before credit is received."

Q. Now, Mr. Etribou, at that time you became positive, did you not, that the operations between United Produce Company and Lofendo were not ethical? A. No, he discussed it—

Mr. Erskine: Wait a second. Let him answer the question.

Mr. Lasky: I did not make my question clear as to date. [285]

The Court: Answer it and explain yourself if you wish to.

Mr. Erskine: Answer the question, Mr. Etribou.

The Witness: Lofendo and a representative of the United Produce Company called and discussed their operations with Cosgrove, my Assistant Manager and apparently they satisfied him.

Mr. Lasky: Well—

Mr. Erskine: Wait a second; let him answer the question.

Mr. Lasky: I move to strike out "apparently they satisfied him" as something relating to the

(Testimony of Frank Etribou.)

conversation of other persons. The question was not related to October 20.

The Court: That portion of the answer which is a conclusion of the witness may be stricken.

Q. (By Mr. Lasky): Mr. Etribou, I did not mean to ask you about your state of mind on October 20 or 22nd. At this moment I am asking you about November 10th. Now, November 10th was about 10 days after you understood that Mr. Rosenthal and Lofendo had called at your Branch, is that right? A. I believe that is correct.

Q. You yourself did not talk to Lofendo and Rosenthal? A. I did not.

Q. On November 10th, ten days afterwards, when you made this new insistence that items be taken for collection only, it is a fact, is it not, that you then became positive, if you had not been theretofore so, that the operations between United and Lofendo were not ethical? [286]

A. I was not positive, no. That is what we were trying to determine by having them come in there.

Q. If you were not positive, you felt very strongly about it, that it was not ethical?

A. I still wanted to be safe rather than sorry.

Q. Will you answer my question? You were then on November 10th strongly convinced that the transactions between Lofendo and United Produce Company were not ethical?

A. In so far as I was concerned they were not good business.

Q. Will you answer my question? You were con-

(Testimony of Frank Etribou.)  
vinced at that time or felt strongly that they were not ethical?      A. Didn't I answer it?

Q. No, I don't believe you did. You referred to good business but I haven't asked you about whether you thought it was good business.

A. It certainly did not satisfy me.

Q. All right, I am going to call your attention, Mr. Etribou, to page 38 of your deposition, line 7, beginning with line 5:

"And was it then that you became suspicious of the check kiting operation?

"A. Well, we were almost positive that something was going on that was not ethical, to put it that way."

Is that right?

The Witness: Where are you reading from?

Mr. Lasky: I read, counsel, at page 38, beginning at line 5, [287] and I read down to line 10.

Mr. Erskine: Well, now, what date does that refer to?

Mr. Lasky: I will ask the witness whether he so testified and if he has something to say about it, about the date when he became almost positive it was not ethical. He may tell me what date it was.

Mr. Erskine: I do not think counsel has the right to ask the witness whether or not on November 10th he became suspicious, at the time of this meeting on November 10th, and then whether or not, as I understood it—

The Court: He is asking him now if he had not

(Testimony of Frank Etribou.)

made these previous statements in his deposition. You can now fix it as to the time he referred to when he testified on his deposition.

Mr. Erskine: Not the time when he testified on his deposition. My point is, your Honor, was this: Counsel was referring to the date of November 10th, and asked him, as I understood the question, whether or not Mr. Etribou at that time was convinced that there was something unethical going on, on November 10th.

The Court: Yes.

Mr. Erskine: And then he reads something from the deposition which would indicate that Etribou said that he thought something unethical was going on on November 10th. Now, I do not think that is fair. You ought to fix the time that Etribou was referring to.

The Court: When he testified. [288]

Mr. Erskine: Yes.

The Court: Yes, it should be fixed.

Mr. Lasky: We will go back in the deposition. We will start on page 37, line 5:

“Q. Now, Mr. Etribou, Plaintiff’s Exhibit 8, for identification consists of the East Bakersfield Branch Office copy of the wire dated November 13, to Merchandise National Bank of Chicago. A. That is right.

“Q. Together with the translation of the code into ordinary English.”

(Testimony of Frank Etribou.)

And there is some discussion about the translation of the code. May I skip that?

Mr. Erskine: Yes, that is all right.

Mr. Lasky: And then we go to line 23:

“Q. Was this advice by your Branch to the Merchandise National Bank that the first checks received from them drawn on the Lofendo account—— A. Drawn by Lofendo.

“Q. Drawn by Lofendo on the account of your Branch were being returned by your Branch protested because there were no funds to meet them? A. That is right.

“Q. Was it then that you became suspicious of a check kiting operation? [289]

“A. Well, we were almost positive that something was going on that was not ethical.

“Q. All right. A. To put it that way.”

Is it a fact on this day, November 13th, you were almost positive that something was going on that was not ethical between Lofendo and United Produce Company?

A. Yes, we suspicioned that, yes.

Q. This is your testimony, is it not?

A. That is correct, yes.

Q. Did anything happen between November 10th, when you gave positive instructions that Lofendo items were to be taken for collection only, and

(Testimony of Frank Etribou.)

November 13th, to increase your suspicion, or was your frame of mind the same on November 10th as it was three days later?

A. It is pretty hard to answer that question, between the 10th and the 13th. That is a long time ago.

Q. And that is what has just been mentioned a few moments ago about the difference between the three days. Do you suggest that you were less suspicious on the 10th when you gave positive instructions than you were three days later?

A. On the 10th I gave instructions and I guess they carried them out on the 13th if the checks were returned. [290]

Q. Yes, and your state of mind about the unethical quality of the transactions between Lofendo and United Produce was just the same on the 10th as it was three days later, was it not?

A. I think so.

Q. Yes, of course. While you wired Merchandise on November 13th that checks were then rejected, you did not advise Merchandise then or at any other time that you suspected a check hiding operation or that you believed the Lofendo-United Produce transactions were unethical, did you?

A. No.

Q. And, of course, you did not do so in October, at the time of your October 22nd meeting?

A. No, we did not notify them.

Q. You never advised them that you were put-

(Testimony of Frank Etribou.)

ting the Lofendo account on the collection basis only? A. No.

Q. Now, you recall that on November 15th a group of checks totalling over \$52,000 arrived in the mail at your branch for deposit and were sent out for collection only. You recall that?

A. I know we had a group of checks that were sent out for collection.

Q. You recall precisely on the same day another group of checks for over \$97,000 arrived at your branch for deposit and your branch gave immediate credit on them and honored them that day. [291] Do you remember that?

A. I didn't know it at the time.

Q. No, you did not know about it at the time and you did not learn about it until after you got the wire from the Continental Illinois on the night of the 18th? A. That is right.

Q. At which time you were astonished?

A. That is putting it mildly.

Q. Yes, putting it very mildly. How does it happened that your bank on the 15th ignored your previous instructions which you had reiterated with insistence?

A. I am sorry, I did not follow you there.

Q. All right, we will start over. Do you know how it happened on the 15th of November after you had given such positive instructions that Lofendo checks were to be taken for collection only, your bank violated those instructions and gave immediate credit?

(Testimony of Frank Etribou.)

A. It was a mistake; somebody overlooked their hand.

Q. Somebody bungled, is that what you mean?

A. Just overlooked their hand, didn't follow my instructions.

Q. Now, you know a man named Dean Howell, do you not? A. Yes, I do.

Q. At the times things broke in about November 19th, 1948, you called Mr. Dean Howell into your office, did you not?

A. I didn't call him. He was instructed—he called me or I had called him—I don't recall which—and we requested him [292] to drop in to see us.

Q. He did come in about the 19th?

A. I don't know the date but he did come in.

Q. It was on or about that date?

A. I think that is correct.

Mr. Lasky: I think that is all.

The Court: I think this is a good time for a recess.

Mr. Erskine: Before we adjourn, your Honor, I think that the cross-examination of Mr. Lasky bears out the point I was trying to make, that it really is prejudicial to one party to litigation to permit the opposite lawyer to put on a partial story before the whole story has been heard, and the practice of the trial courts in this state, as I understand that practice, seems to be vindicated by what has taken place. I am faced with this quandary. I would like to put on the whole story on my cross-examination. I won't ask leading questions, but I

(Testimony of Frank Etribou.)

would like to have the witness tell the whole story of this account as we understand it, from our point of view, and I just advise the Court and counsel I would like to do that at this time.

The Court: I think it is open for that. The examination has been conducted covering—

Mr. Erskine: The rebuttal and everything else.

The Court: The history of the account has been opened.

Mr. Erskine: I just wanted to mention [293] that.

The Court: I think you are perfectly within your rights to examine the whole Lofendo account and the transactions between Lofendo and the bank.

Mr. Lasky: I would think so, too.

The Court: Very well, the Court will stand in recess until ten minutes after eleven.

(Recess.) [294]

#### Cross-Examination

By Mr. Erskine:

Q. Now, Mr. Etribou, counsel asked you about certain extracts from your deposition, and I will ask you whether or not it is not a fact that when you gave that deposition to which counsel referred, you also testified as follows:—

Mr. Lasky: Page, please?

Mr. Erskine: Just a second; I am trying to pick it up here. Beginning with line 12 on page 34.

Q. (Continuing.)

(Testimony of Frank Etribou.)

“What was it then, in your state of mind to think the protection of the assets of your bank required you to insist that no credit be given on the Lofendo account on any items until they were actually collected?

“A. Oh, I stated that half a dozen times in my previous statements. Because of the activity and the size of it. You don’t pass credit to an individual because you like the way he combs his hair. He has to have some assets behind him. It is just like granting a loan.

“Q. Did you not then suspect that there was a check kiting operation?

“A. I would have thrown it out a long time ago if I thought that.

“Q. When did you first suspect a check kiting operation between Lofendo and the United Produce Company?

“A. What made you think I suspected that? [295]

“Q. Did you never suspect that?

“A. At a later date we did.

“When was that?

“We found out that they had about two or three hundred thousand dollars worth of checks floating around with no funds to meet them.

“When did you find that out?

“Oh, phone calls from various locations throughout the United States.

“At what time?

(Testimony of Frank Etribou.)

“What do you mean, what time?

“When were those phone calls?

“You mean the dates?

“Yes.

“Right after we started bouncing these checks.

“When was that?

“Oh, the records will indicate that.

“Show me the records so I will know what dates you were talking about.

“The return items. When we started warning the various correspondents throughout the United States that several items were being returned then we got calls from Chicago, Philadelphia and various other points.”

Did you give that testimony?

Mr. Lasky: Now, if the Court please, reading all this [296] deposition is equivalent, it seems to me, to putting leading questions to the witness. Of course I realize the man has the right, if any passage of the deposition which I have read was inadequate and incomplete, to complete it. But to go on at great length on matters of this kind is the same as leading questions. The witness has said something once before, it would be irrelevant.

Mr. Erskine: That is exactly why I was reading.

The Court: Well, isn't counsel entitled to ask leading questions on cross-examination?

Mr. Lasky: Yes, I would accept that. He is, even though it is his own witness.

(Testimony of Frank Etribou.)

Mr. Erskine: And the other—

The Court: It is not his witness; you called the witness and you are entitled to cross-examine him. That doesn't change the fact that—

Mr. Lasky: That's right, I think that is correct.

The Court: He can cross-examine him.

Mr. Lasky: I was in error there.

Mr. Erskine: And counsel is not right in his other point. He read certain extracts from this deposition—

Mr. Lasky: Well, I realize I was wrong. I withdraw the objection.

The Court: The objection has been withdrawn, counsel.

Q. (By Mr. Erskine): You so testified, did you not? [297] A. I did.

Q. And now, Mr. Etribou, do you remember the first date on which your branch rejected checks drawn by Lofendo on the account?

A. I don't recall the exact date.

Mr. Erskine: Perhaps Mr. Lasky will stipulate that the Bakersfield branch wired to the central office of the Bank of America on November the 12th, rejecting three checks, upon the ground that the checks were drawn against uncollected funds and that on November the 13th the central office wired the Merchandise National Bank to that effect and that the wire was received by the Merchandise National Bank on November the 15th?

Mr. Lasky: Is that the wire which in the

(Testimony of Frank Etribou.)

course of the examination of Mr. Etribou we referred to as having been sent out on the 13th, or is there still another wire that you refer to?

Mr. Erskine: I think that was it. It was the wire from the branch, of November 12th, to the central office. On November 13th the central office wired the Merchandise.

Mr. Lasky: Well, there isn't any doubt that there was a wire sent to Merchandise on the 13th, which was received on the 15th.

Mr. Erskine: Well, I have it.

Mr. Lasky: Respecting the rejection of three checks. I think that has already been covered by earlier testimony and [298] stipulation, but I stipulate again.

The Court: Very well.

Mr. Lasky: Whether it went out from the branch on the 12th, I don't know.

Mr. Erskine: Well, I will ask the Clerk to mark this.

Mr. Lasky: If you have the papers to show it, I will agree to it without question.

Mr. Erskine: Yes. Well, they are right here and I will show it to you.

The Clerk: Defendant's Exhibit M for identification.

(Whereupon telegram referred to above was marked Defendant's Exhibit M for identification only.)

Mr. Lasky (Examining document): Well, these

(Testimony of Frank Etribou.)

papers seem to support that statement, and I will stipulate to it.

Mr. Erskine: All right. The statement is that the wire or a wire, was sent from the East Bakersfield branch of the bank to the central office of the bank on November 12, 1948, stating that three checks drawn by Lofendo against the East Bakersfield branch were being rejected because drawn against uncollected funds; and that on the 13th the central office wired the Merchandise Bank and that the Merchandise Bank received the wire on the 15th.

The Court: The record may show that it is so stipulated.

Mr. Lasky: Yes.

Q. (By Mr. Erskine): Now, Mr. Etribou, was that the first [299] time that your branch had rejected any of the Lofendo checks?

A. To the best of my knowledge, yes.

Q. Now I would—

Mr. Erskine: I would like to have this wire marked.

The Clerk: Defendant's Exhibit N for identification.

(Whereupon wire referred to above was marked Defendant's Exhibit N for identification only.)

Q. (By Mr. Erskine): I show you a wire marked Defendant's Exhibit N for identification, Mr. Etribou, and ask you if that wire was sent by your branch?

(Testimony of Frank Etribou.)

A. Yes, it was originated at our branch.

Q. Now does that refresh your recollection, that wire, as to—

Mr. Lasky: May I see it if you are going to question him about it?

Mr. Erskine: Yes, pardon me.

(Document examined by Mr. Lasky.)

Mr. Lasky: All right, go ahead.

Q. (By Mr. Erskine): Does that wire refresh your recollection, that is, the wire Defendant's Exhibit N for identification, as to the date upon which you rejected, upon which your branch rejected, additional Lofendo checks drawn upon the account?

A. Yes, it was on November 16, '48.

Q. That was the—and on what ground, what reason is stated in that wire as the reason for the rejection?

A. Drawn against uncollected funds. [300]

Q. And that was the second time checks were rejected, is that right?

A. That is correct, yes.

Q. Now, Mr. Etribou, from testimony that I have read here, which says this:

“What made you think I suspected that?

“Did you never suspect that?

“At a later date I did.

“When was that?

“We found out that they had about two or three hundred thousand dollars worth of checks floating around with no funds to meet them.

(Testimony of Frank Etribou.)

“When did you find that out?

“On phone calls from various locations throughout the United States.

“At what time?

“What do you mean, what time?

“When were those phone calls?

“You mean the dates?

“Yes.

“Right after we started bouncing these checks.

“When was that?

“Oh, the records will indicate that.”

Now, when were those phone calls received with reference to this wire that has just been marked Defendant's Exhibit N for [301] identification? That is, the wire of November 16th?

A. When were the phone calls, you say?

Q. Yes.

A. Well, the phone calls were actually taken by Tarr, not by me.

Q. Do you have any recollection with reference to that wire, about when Tarr took the calls?

A. Well, they were immediately after that. Each day he would tell me about receiving a call from some bank, from eastern points, requesting information pertaining to the account.

Q. And it was in the week commencing on November the 15th, is that right?

A. That is correct.

Q. Now can you say, Mr. Etribou, with reference to these telegrams and these phone calls and

(Testimony of Frank Etribou.)

the testimony that I have read to you, can you give us approximately the date when you first suspected that a kiting operation was going on? That is, felt ethically—felt that something ethically wrong was going on? When did you first suspect that, when did you first feel that?

A. Well, right after we returned these checks.

Q. Which checks?

A. His checks—Lofendo's checks.

Q. Well, with reference to these wires, can you give approximately the date when you had that feeling that something [302] ethically wrong was going on?

A. Oh, I would say it was around the 13th, 14th; in there.

Q. Now, I would like to refer you again to your deposition, Mr. Etribou, and ask you if you gave this testimony.

Mr. Lasky: Page, please?

Mr. Erskine: It is page 135, commencing at line 18:

“Q. It is also alleged at the top of page 7 that for at least a month prior to November 15, 1948, United Produce Company was engaged in what is known in the banking business as kiting checks and was using Lofendo in order to engage in that practice. When did you learn that?

“We weren't sure that that was the case. They were supposed to be legitimate dealers, legitimate transactions.

(Testimony of Frank Etribou.)

"You say you weren't sure that that was the case? No.

"When did you become sure that it was?

"After we learned that they had checks bouncing all over the country.

"And when was that?

"Between the 15th and thereafter, after the 15th."

You gave that testimony, Mr.——

A. That is correct.

Q. And is that testimony substantially correct?

A. That is correct, yes.

Q. Now, counsel has referred you to a memorandum dated October [303] the 22nd. Counsel has referred you to that memorandum, which has been marked in evidence in this case as Plaintiff's Exhibit 12. Do you recall that memorandum, Mr. Etribou? A. Yes, I do.

Q. Prior to the time that memorandum was prepared, did you have a discussion with Mr. Tarr with respect to the Lofendo account?

A. He brought it to my attention.

Q. And you had a talk with him at that time about it? A. That is correct.

Q. Did you say in that conversation—was anything said in that conversation with Mr. Tarr with respect to the making of an inquiry at the Merchandise National Bank?

A. At my direction he made such an inquiry.

Q. That is, at your direction he inquired of the Merchandise National Bank with respect to the

(Testimony of Frank Etribou.)

standing of the United Produce Company, is that right? A. That is correct.

Q. Do you know whether he received an answer to his inquiry? A. Yes, he did.

Mr. Erskine: I would like to have this wire marked for identification, please.

The Clerk: Defendant's Exhibit O for identification.

(Whereupon wire referred to above was marked Defendant's Exhibit O for identification only.) [304]

Mr. Lasky: May I see what it is?

Mr. Erskine: Yes, it is the wire of October the 20th.

(Document examined by counsel.)

Q. (By Mr. Erskine): I will show you this document that has been marked Defendant's Exhibit O for identification and I will ask you if that is the telegram which Mr. Tarr showed you as having been received from the Merchandise National Bank?

A. That is the original telegram, yes.

Mr. Erskine: I would like to offer this in evidence, if the Court please.

The Court: Is there any objection?

Mr. Lasky: No objection.

The Court: So admitted.

The Clerk: Defendant's Exhibit O in evidence.

(Whereupon Defendant's Exhibit O for identification only was received in evidence.)

Mr. Erskine: I would like to read it to the Court,

(Testimony of Frank Etribou.)

if the Court will permit me. (Reading Defendant's Exhibit O.)

Q. (By Mr. Erskine): Now, do you know, Mr. Etribou, whether or not Mr. Tarr contacted the Fresno branch of the Bank of America for more information, as suggested by the wire?

A. He did, by phone.

Q. And did he report to you what he had been told by the Fresno branch?

A. Not in detail. However, he did say it was good, along the [305] same lines as this wire. They had a good record.

Q. That the United Produce, that the Merchandise had advised the Fresno branch that the United Produce Company had a good record, is that right? A. That is right.

Q. Now this memorandum, Mr. Etribou, the memorandum that has been marked Plaintiff's Exhibit 12, states:

“This has been taken up with Mr. Etribou, manager, and he has given instructions that we do not accept these checks for immediate credit until such time as Mr. Lofendo can be contacted and his method of operation discussed.”

Now do you know when Mr. Tarr contacted Mr. Lofendo?

A. No, I don't know when he contacted him, but he did come to the branch.

Q. He did come, did Lofendo come to the branch? I withdraw that.

(Testimony of Frank Etribou.)

With respect to the date of this memorandum, October the 22nd, 1948, about when did Lofendo come to the branch?

A. Shortly after that. I don't recall the exact date.

Q. Shortly afterwards? A. That is right.

Q. Did you talk to Lofendo at that time?

A. No, I did not.

Q. Who talked with him at that time?

A. Mr. Cosgrove, my assistant manager. [306]

Q. And was Lofendo accompanied by anyone when he called at the branch?

A. I think a Mr. Rosenthal, who was vice president of the United Produce.

Q. And they had a talk with Cosgrove, did they?

A. That is correct.

Q. And that was shortly after your memorandum of October the 22nd?

A. Very shortly after that.

Q. In which you gave instructions that—in which you are quoted as giving instructions that "No checks should be accepted for immediate credit until such time as Mr. Lofendo can be contacted"?

A. That is correct.

Q. Lofendo came into the branch shortly thereafter? A. That is also correct.

Q. And had a talk with Mr. Cosgrove?

A. Correct.

Q. And you did not participate in that conversation? A. I did not.

Q. Did Cosgrove report to you after the conversation what had been said to him by Lofendo and

(Testimony of Frank Etribou.)

Rosenthal, or what had taken place in the conversation?

A. Yes, he told me that he was satisfied. However, he requested that they maintain a free balance and that they write him a letter explaining their operations. [307]

Q. Cosgrove told you that, did he?

A. That is correct.

Q. He told you that they had satisfied him, that he had told them that they should carry a balance and they should write him a letter describing their operation, is that correct?

A. That is correct.

Q. And from then on the account was carried on substantially as it had been previously, is that right? A. That is right.

Q. Counsel has called your attention, Mr. Etribou, to the memorandum of November 15th. This memorandum says, "In further to the activities and operations of the account of Frank C. Lofendo, shortly after the last memorandum, Mr. Lofendo flew from Chicago with the president of the United Produce Company. The matter of his deposits in checks drawn against his account was discussed with Joseph V. Cosgrove, assistant manager . . ." And skipping—"This matter was again rediscussed at our officers' meeting on Wednesday, November 10th, and at that time Mr. Etribou insisted that all items deposited should be cleared before credit is allowed."

Now, Mr. Etribou, referring you to that memorandum, which you initialled, and which has been

(Testimony of Frank Etribou.)

introduced as evidence in this case, and marked Plaintiff's Exhibit 13, I will ask you whether or not at that officer's meeting on Wednesday, November 10th, was there any discussion as to whether or not Cosgrove had received the letter for which he had asked. [308]

A. I asked him the question. It had not been received.

Q. When he told you it had not been received what did you say?

A. I told him to follow my instructions.

Q. That is not to pay any checks except against collected funds?      A. Correct.

Q. Did you know anything at that time, on November 10th, that anything crooked was going on in connection with this account?

A. No, I did not.

Mr. Lasky: I think, if your Honor please, that that is calling for his conclusion.

Mr. Erskine: Well, it is an answer to your cross-examination.

Mr. Lasky: It is an ultimate conclusion. Whether he believes is another thing.

The Court: Overruled. You may answer the question.

Q. (By Mr. Erskine): Did you believe at that time that anything crooked was going on in connection with this account?

A. I didn't know of anything that was going on, no.

Q. Did you believe it?

(Testimony of Frank Etribou.)

A. No, I had no proof.

Q. In conducting your banking business, Mr. Etribou, and as an experienced banker, do you presume a man is innocent until he is proven guilty? I do not know how else to express it and I [309] want to get that.

A. They are all honest until we find out differently. We would have a difficult time conducting our business if we did not.

Mr. Lasky: I would go so far as to stipulate, counsel, that bankers have to avoid charging people with wrong doing or the banks will be sued all the time. A banker's life is not an easy one.

Q. (By Mr. Erskine): In other words, Mr. Etribou, you do not charge a man with fraud, kiting, or anything else unless you have some proof that that is what he is doing, is that right?

A. That is correct.

Q. On November 10th you did not have any proof of that sort with respect to this account?

A. None whatsoever.

Q. Mr. Etribou, counsel has referred to your experience as a banker. How long have you been a banker?

A. This is my first and only job. I started in as a messenger and now I am the bank manager.

Q. In the same branch?

A. The same—its predecessors.

Q. And the same banking quarters?

A. No, we recently moved. I have a new office.

Q. About how long is that, Mr. Etribou?

(Testimony of Frank Etribou.)

A. Thirty years. [310]

Q. At the present time how much in deposits has your branch got?

A. Approximately twenty million.

Q. Was that so in 1948?

A. Very close to that. It might have been a little more or a little less.

Q. When did you first meet this man Lofendo?

A. He was introduced to me by Mr. John J. Tozzi. He was a valued client of ours and a friend.

Q. Had you known Tozzi—is that the way you say it? A. Yes.

Q. Had you known Tozzi long?

A. Oh, yes, he is a farmer-shipper.

Q. Has he a good reputation in the community?

A. Yes, he has.

Q. Did you state when you met Lofendo?

A. He brought him into the bank and introduced him.

Q. About when?

A. Oh, the signature card would indicate the date his account was opened.

Mr. Lasky: We stipulated the other day that was about March 12th.

Mr. Erskine: Yes.

Q. That was about the date?

A. That was exactly the date. [311]

Q. That was the first time you had met Lofendo?

A. First time I had seen him in the bank.

Q. What did Tozzi tell you about it?

(Testimony of Frank Etribou.)

Mr. Lasky: That is hearsay, what was said on March 12th.

The Court: What is the purpose of this, counsel?

Mr. Erskine: I want to show that the man was introduced to the branch as a reputable decent man. That is all.

The Court: I do not think there is any question about that, that the bank was doing the right thing in opening an account for him and doing business with him. I do not think it is of any importance in any event.

Mr. Erskine: Very well. I will withdraw the question.

Q. After he was introduced to you, did you see Lofendo again on any occasion?

A. I never saw him in the bank but I do eat my lunch at the Bakersfield Inn, and if my recollection serves me right, I saw him there just in passing, that is all. I think he stopped there, I am sure he did.

Q. After he opened the account you did not have any real contact with him?

A. I never had any contact of any kind.

Q. Did he borrow any money from your branch?

A. No, sir.

Q. Did he ever apply for a loan at your branch?

A. Not with me or any of the other officers. [312]

Q. You testified, Mr. Etribou, with respect to a conversation which took place between you and Mr. Messenger on November 17th. Had you ever known Mr. Messenger prior to that conversation?

(Testimony of Frank Etribou.)

A. I had never seen him until the day I met him here.

Q. You had never talked to him over the phone prior to that time?

A. Just that one conversation only.

Q. Had you ever had any contact with the Merchandise National Bank prior to that day, conversation with any of its officers? A. No.

Mr. Lasky: You do not mean to negative that they had business transactions?

Mr. Erskine: No, just personal contact between any of the other officers of Merchandise National Bank.

A. No, I did not.

Q. (By Mr. Erskine): You had received this wire of October 20th that has been introduced in evidence; that is correct, is it not, the wire Defendant's O? A. Yes.

Q. But you had not had—

A. No conversation, phone conversations.

Q. And you did not know personally any of the officers of that bank?

A. Never seen them or met them.

Q. Was anything said in that conversation between you and Mr. Messenger with respect to whether or not the Merchandise Bank [313] was in trouble because of transactions in the United Produce Company matter?

A. Well, I gathered so by the tone of his voice. He seemed to be a little bit excited.

(Testimony of Frank Etribou.)

Q. Did he say anything to that effect that you can recall?

A. I can recall the conversation very vividly.

Q. Just tell us the conversation.

A. In my own simple way I think I can tell it.

Q. What is that?

A. In my own simple way I think I could tell it all in a very short time.

Q. All right, tell us the conversation.

A. I was told I had a long distance call from Chicago. The man on the other end told me he was the comptroller of Merchandise National Bank and his name was Messenger. He asked me if I knew anything about the account of Frank C. Lofendo, if I was familiar with it. I told him that we had such an account, and he very rapidly read off a lot of figures. He wanted me to find out if they were paid, and I wrote down a couple of them and I said, "Just a minute. It appears to me we are doing this the hard way. Why don't I get the account or have somebody bring it to me and you read off the checks that are paid. You check them off your list."

He said, "That is a good idea."

I immediately called Mr. Tarr across the lobby and requested [314] he produce the account, which he did.

Q. Would it bother you if I interrupted you at that point? A. Not at all.

Q. I will show you a document which has been introduced in evidence in this case, Defendant's Exhibit C, and I will call your attention to both pages

(Testimony of Frank Etribou.)

of that document and ask you if that is the part of the commercial ledger account of Lofendo with the bank which you asked Mr. Tarr to bring to you?

A. That is correct. This is a certified copy made by one of our bookkeepers, a Mr. Tarr. It has been checked.

Q. You asked Tarr to bring you that document, did you?

A. That is correct. He sat at my desk while I carried on a conversation with Mr. Messenger, and we discussed the account in detail. I gave him the checks that were paid from a specific date. I don't recall what date he was interested in. And we discussed the account in detail as to balance, deposits, and debits. He asked me if I had received an advice of credit covering the six checks that we have heard so much about, and I told him—he said it was mailed on the 15th.

I said, "If that is the case, we should have it today." However, the collection department was closed and I had no way of determining if they were in our office, and he told that he would like to have me offset that particular entry.

A. Would you let me ask you at this time, Mr. Etribou, what did you understand Mr. Messenger to mean by the word "offset"? [315]

A. To cancel it.

Q. That is a reversing entry?

A. That is correct.

Q. Go ahead.

A. I told him I was sorry, I couldn't go along

(Testimony of Frank Etribou.)

with him on that score. However, if he was in trouble, and I assumed that he was, that I would be very happy to do anything I could to assist him and his bank, providing it did not cost us anything.

He asked me then if we had airline service into Bakersfield. I told him yes, that United came in there. He said he was going to send a man out to Bakersfield and he would be there the following morning. I told him if he would have his man call me or wire me, I would pick him up and bring him to the bank. He did not show up.

Mr. Lasky: I move to strike that last as not part of the conversation.

Mr. Erskine: That is all right. It may go out.

The Court: It may be stricken at this point.

The Witness: That is about the extent, the principle, the meat of it.

Q. Was anything said in that conversation, Mr. Etribou, with respect to the name of this man that was going to come out?

A. I don't recall whether he mentioned the man that would come out. He said he would send a man out.

Q. Was anything said in that conversation with respect to the [316] question of whether or not that man should bring any checks with him?

A. Oh, yes. I will add it to it. I told him if he had any checks of Lofendo, and the signature was genuine, if he brought them out and we had a black balance, that I would give him preference, inasmuch as he was a correspondent bank of our bank.

(Testimony of Frank Etribou.)

Q. Did you tell Mr. Messenger in that conversation that you would either not enter the credit or you would enter the credit and charge checks against it, whichever the Merchandise Bank wanted you to do?

A. I told him I couldn't go along with him. He requested that I offset the entry. I told him I could not do that. I had no right to do it.

Q. I would like to get an answer yes or no to the question I just put to you, Mr. Etribou. Did you tell Mr. Messenger at that time that you would either not enter the credit or you would enter it and charge checks against it, whichever the Merchandise Bank wanted you to?

A. I was going stand on the entry, yes.

Q. Did you tell that to Mr. Messenger?

A. Oh, no, I didn't tell him that.

Q. Did you tell him anything like that?

A. All I told him is I couldn't go along with his request.

Q. And his request was that the credit be offset, is that it? [317]

A. That is correct, and as far as I was concerned, the transaction was closed and I would follow the regular procedure.

Q. Now, I believe that you have stated that in your discussion with Mr. Messenger you told him to read off the checks in which he was interested commencing on a certain date, is that right?

A. That is correct, yes. [317-A]

(Testimony of Frank Etribou.)

A. That is correct, yes.

Q. You say that you can't recall now exactly the date which he specified?

A. No, I can't. He was the one who was asking the questions and I gave him the information.

Q. I believe you have testified that you then read off the debit items in the account to him?

A. That is correct.

Q. You have stated that you also discussed the account in general, and read off the credits in the account?

A. I read off anything and all pertaining to the account.

Q. From the date he specified?

A. That is right.

Q. Including the credit items as well as debit items?

A. That is right. I told him I didn't know what other items we had in our work.

Q. What do you mean in your work, Mr. Etribou?

A. Well, items that might have come in but had not been posted.

Q. You told Mr. Messenger that, did you?

A. That is correct.

Q. Did you tell him the amount of the balance to the credit of Lofendo as of the date of which you were talking with him? A. The conversation?

Q. Yes.

A. I am certain of that. [318]

Q. Referring you to this exhibit, Defendant's

(Testimony of Frank Etribou.)

Exhibit C, what did you tell him with respect to that?

A. The balance I think was—that was on the 15th—17th—this delayed posting deal, I can't tell you—\$699.02—I am sure that is correct.

Q. That is what you believe you told him?

A. Yes.

Q. Now, Mr. Etribou, was anything said in the conversation with respect to any outstanding collections of the Branch on which you had not yet received some return?

A. Yes, we discussed that and Tarr got me that information.

Q. What was said in that respect with Mr. Messenger?

A. He was told that we had checks totaling one hundred and fifty some odd thousand dollars that had been sent to him for collection. I think two collection letters made up that total. I do not recall that amount.

Q. You told that to Mr. Messenger?

A. Tarr got me the information, yes.

Q. That two collection letters had been sent out upon which you had not received a return?

A. That is right.

Q. What is your best recollection with respect to the amount of those collections letters?

A. Oh, they totaled one hundred and fifty some odd thousand, I think.

Q. Did they include the collection for the six checks for [319] \$113,000?

A. That is correct.

(Testimony of Frank Etribou.)

Q. I believe you testified in answer to questions put to you, by Mr. Lasky that one reason why you entered the credit of \$113,000 to the account on November 19th was to meet the overdraft arising out of the fact that \$97,000 in checks had been rejected; that is correct, is it?

A. That is correct.

Q. Did you have any other reason for entering that credit, Mr. Etribou, other than the one stated by Mr. Lasky?

A. Yes, the funds belonged to Mr. Lofendo. We were acting as his agent.

Mr. Lasky: If that is merely what he thought I have no objection.

The Court: Yes. The conclusion as to whether he was acting as agent is something the Court will decide.

Mr. Erskine: I agree that that go out.

Q. In other words, one of your reasons for entering the credit was you believed those funds were Lofendo's funds?

A. That is correct, they were.

Q. Now, Mr. Lasky asked you whether or not you inferred—I ask you this in substance—whether or not you inferred what the Merchandise National Bank done with respect to the six checks from the statement made to you by Messenger that the advice of credit had been sent out. Do you recall that, Mr. [320] Etribou?

A. I think he told me he had made a mistake.

(Testimony of Frank Etribou.)

Q. I asked you if you recall Mr. Lasky stating it? A. I do not think so.

Q. Mr. Lasky asked you, according to my recollection, whether or not you had inferred anything with respect to what the Merchandise National Bank had done with respect to the six checks from Messenger's statement to you that the advice of credit had been sent out. Do you recall that?

A. He told me that advice of credit had been sent out, yes.

Q. What did you infer from that as to what the Merchandise Bank had done with respect to the six checks?

A. The customary procedure. They charged the account of the client and credited our head office, our account with the amount. The transaction was closed.

Q. At the time you had your conversation with Mr. Messenger did you have any opinion as to whether or not your bank, in view of those acts of the Merchandise, could agree to the revocation or cancellation of this credit?

A. I do not see how they could.

Q. Your opinion was that you could not, is that it? A. That is right.

The Court: That again is one of those. Do you mean you are asking his opinion as to what he could do under the law?

Mr. Erskine: Yes, as of the date of the conversation. [321]

(Testimony of Frank Etribou.)

Mr. Lasky: I have not objected because I asked him what he had in his mind at the time.

The Court: I understand the situation.

Q. (By Mr. Erskine): You were examined with respect to certain letters received by you from Mr. Duncan. Did you have a telephone conversation with Mr. Duncan of the main office of the Branch on November 18th?

A. Yes, I had several calls.

Q. Several calls, did you say?

A. From head office, yes. I had a call from Mr. Duncan, yes.

Q. Do you recall your conversation with Mr. Duncan? A. Very short.

Q. What was the conversation?

A. Well, he was discussing various bookkeeping entries concerning the account of Lofendo and I would have to get the information from Tarr, so I referred the call to him.

Q. You talked with Mr. Duncan for a few minutes and then referred him to Mr. Tarr?

A. Just a very short time.

Q. Did Mr. Tarr have a conversation with him then?

A. He did, yes. I switched the call.

Q. Did you in that conversation with Mr. Duncan have any discussion with respect to the advice of credit?

A. I doubt very much if we had much to say about that. In fact, my conversation was a very short one. [322]

(Testimony of Frank Etribou.)

Q. The very next day, however, you received this letter, Plaintiff's Exhibit 11, from Mr. Duncan, did you? A. That is correct.

Q. You were asked by Mr. Lasky when you entered the credit for the six checks to the Lofendo account. When was that, Mr. Etribou?

A. When we made the entry, you say?

Q. Yes.

A. We received it at 8:15 and it was made shortly after that on the 19th. We were expecting it, and we certainly would not delay the making of the entry.

Q. When you say that it was received at 8:15, on what do you base that statement?

A. The time stamp that appears on the reverse side.

Mr. Lasky: We stipulated when that was received.

Q. (By Mr. Erskine): The time stamp you refer to is the one marked "East Bakersfield Branch," is that correct? A. That is correct.

Q. And that time stamp indicates the advice of credit was received at about 8:15, was that right?

A. That is correct.

Q. And your testimony is that you directed that the credit be entered shortly thereafter?

A. That is right.

Q. What time of day did you receive this letter, if you can [323] recall, this letter of November 18th, 1948, addressed to you by Duncan?

(Testimony of Frank Etribou.)

A. The time stamp indicates 2:00 o'clock on November 19th.

Q. That is the time stamp on the letter indicates that you received it at about 2:00 o'clock?

A. That is right.

Q. When you received it, on the day that you received it, did you write in the margin of the letter the words that Mr. Lasky read to you: "Like Hell I will"? A. That is correct.

Q. On that same day? A. Yes.

Q. At the time you wrote those words, on the margin was the credit entered or was it not?

A. It had already been made.

The Court: Gentlemen, I think it is time to recess. The Court will stand in recess until 2:00 o'clock this afternoon. [324]

Tuesday, June 20, 1950—2 P.M.

The Clerk: Merchandise National Bank v. Bank of America, on trial.

### FRANK C. ESTRIBOU

called as an adverse witness on behalf of the plaintiff, resumed the stand; previously sworn.

#### Direct Examination (Resumed)

By Mr. Erskine:

Q. Now, Mr. Etribou, I want to call your attention to this Defendant's Exhibit C here, the ledger sheet of the Lofendo account, and calling your

(Testimony of Frank Etribou.)

attention to any of the items entered in the balance column on the second page of this—take, for example, the item \$699.02, entered as of November the 15th, 1948—I will ask you whether or not as a manager, you, by looking at that ledger sheet, can get a definite answer to the state of depositor's account, by looking at the ledger sheet?

A. Just the items that are posted only. There may be other work in the bank that hasn't been posted, both debits and credits.

Q. The Bank practices a method known as post dating, does it not?

A. Delayed posting, yes.

Q. Delayed posting. And that practice is that it posts items received on or counter work received on one day on the day [325] following the day on which they are received, is that right?

A. That is correct.

Q. And so by looking at the—withdraw that.

Is it correct to say that the items entered in this column balance is what you bankers call a noonday balance?

A. I think that is what they term it, yes.

Q. And is it correct to say that the noonday balance in and of itself does not reflect, or need not necessarily reflect, the true state of the customer's account? A. As of that time?

Q. Yes.

A. That is right, it doesn't always reflect the true status.

Q. Because there may be items in the work?

(Testimony of Frank Etribou.)

A. Unposted items.

Q. Unposted items that do not appear as of that day on the ledger sheet? A. That is correct.

Q. Now counsel asked you, Mr. Etribou, about your practice, the practice of the bank, with respect to entering credits, and he called your attention particularly to the advices of credit similar to Defendant's Exhibit A, which has been introduced in evidence in this case (handing to witness); and I will ask you, Mr. Etribou, to clear up what seems to me to be somewhat of an inconsistency in the testimony. I will ask you to state what is the practice of the bank with respect to [326] entering credits when items are sent out by the bank for collection?

A. Ordinarily we wait until we have the advice of credit in our possession. That is, where we request advice of payment by ordinary mail. If it were by telegraphic instructions, why, we would naturally pass credit on it upon receipt of the wire, if it was paid.

Q. Well, if you ask for telegraphic instructions, why, when you receive the wire, you enter the credit? A. That is correct.

Q. And if you ask for instructions by mail, then you wait for an advice similar to Defendant's Exhibit A, is that right? A. That is correct.

Q. Now, do you ever, Mr. Etribou, in such a case, enter a credit in accordance with the practice of the bank when you have asked for mail instruc-

(Testimony of Frank Etribou.)

tions, prior to the receipt of an advice of credit respecting the transaction?

A. Yes, quite often. In the case of a client, for instance, if he would come in and ask for immediate credit on an item that we know had reached its destination, we would call and request information pertaining to its fate, as to whether it was paid or unpaid.

Q. Yes?

A. And if the bank payor would indicate that it had been paid, why, we would follow the practice and give our client immediate [327] credit.

Q. Without waiting for the advice?

A. That is correct.

Q. Now I think you have said that you had a conversation with Mr. Duncan on November the 18th. Did you have a conversation with Mr. Kenneth Johnson, an assistant counsel of the bank, on that day? A. Yes, I did.

Q. Tell us, was that conversation in the morning or the afternoon?

A. I think, I am almost sure it was in the morning.

Q. In the morning?

A. It is pretty hard to state. I can't remember, I am sorry.

Q. You don't recall that?

A. No, I couldn't tell you the exact time.

Q. Do you recall the conversation at all, Mr. Etribou?

A. Oh, it had to do with this \$113,000 odd, and

(Testimony of Frank Etribou.)

he informed me that Mr. LeRoy was in his office and that LeRoy had informed him that the advice had been sent out in error, and that the checks had not been paid, and as a result of that, he thought that we should go along with his request that we not pass the entry. I told him, as I had previously stated to Mr. Messenger, that we would be very happy to help him if we could, providing it didn't cost us anything.

Q. Did Mr. Johnson say anything or ask you with respect to [328] the status of the account?

A. I told him that as far as the account was concerned, at that moment it appeared to be all right.

Q. That is, it appeared to have a black balance?

A. That is correct.

Q. Now just a few more questions, Mr. Etribou; according to the custom of your branch, when checks are received for deposit, what can the bank do with respect to those checks, what two courses can it take?

A. It can either give you immediate credit or enter them for collection.

Q. Now your bank, I presume, your branch, has customers who are both depositors with the branch and also borrowers from it? A. That is right.

Q. And the branch, I presume, keeps a ledger sheet showing the status of the commercial account and also the record of the loan, does it?

A. Yes, that is separate and apart.

Q. And do you regard, when a customer is both

(Testimony of Frank Etribou.)

a borrower and a depositor—do you regard the ledger sheet of his commercial account and the ledger of his loan as one account?

Mr. Lasky: Now, just a moment. If the Court please, I have two objections to that. First, of course, it isn't cross.

Mr. Erskine: It is what? [329]

Mr. Lasky: It is not cross-examination of anything asked on direct. But more important than that, what this witness and his branch may regard the situation to be with respect to his customers has nothing to do with the case and no bearing upon what—

The Court: It doesn't have any bearing upon Lofendo's account, does it?

Mr. Erskine: No, sir.

The Court: It has none. That is not the situation.

Mr. Erskine: No, it doesn't. It is just as a sort of a rebuttal to the statement that Mr. Messenger—

The Court: Well, what his practice is down there wouldn't have any bearing upon what the practice is in Chicago.

Mr. Erskine: Well, I imagine that the practice throughout the country is about the same, so far as matters of that kind go, that sort are concerned.

The Court: I will sustain the objection.

Mr. Erskine: Well, I think then that that is all.

Mr. Lasky: I have a few questions, if the Court please.

(Testimony of Frank Etribou.)

Now, I might say, before going on with this witness, that this subject of practice on cash and collection letters has come up over and over again, and it came up yesterday, and instead of going into further interrogation of this and other witnesses, I have drafted a form of stipulation which I think if we could enter into might save a great deal of time. [330]

The Court: All right.

Mr. Lasky: And I think at some convenient time we might handle that in the manner in which we have been handling such things. I will give a copy to counsel.

Mr. Erskine: I will be glad to stipulate. I think that we will be able to save some time and agree, your Honor.

The Court: Yes. I think you can agree. As a matter of fact, there is no real conflict in what has transpired in connection with it.

Mr. Lasky: No. I think we ought to—

The Court: That is, you are talking about whether a credit is given or not, if an item is deposited for collection, as to when the credit is given.

Mr. Lasky: Yes, and the whole business of what happens when you send out a cash letter and what happens when you send out a collection letter—

The Court: Yes.

Mr. Lasky: Now the stipulation I proposed here is slightly over a page long, and I think we ought to be able to come to some agreement on it as to banks' understandings.

(Testimony of Frank Etribou.)

The Court: If you will read it right now, perhaps we could agree on it.

Mr. Lasky: Shall we read it aloud?

The Court: No, let counsel read it.

(Proposed form of stipulation examined by counsel.) [331]

Mr. Erskine: Mr. Tobey suggests that sometimes a letter of cash, or a cash letter, describes the item; but I don't think it makes any difference.

The Court: So far as a cash letter is concerned, what difference does it make? It is not involved.

Mr. Tobey: It shouldn't be in there because it is a different practice.

Mr. Erskine: I agree with Mr. Lasky, your Honor, that it is important for us to have this distinction in mind. It will appear later in the case, I am sure.

The Court: You want to have it in?

Mr. Erskine: I agree with him that it is necessary.

Mr. Lasky: Yes, I think, without having it in there, maybe there will be confusion. That is all I am thinking of.

The Court: Very well.

(Proposed form of stipulation examined further by counsel.)

Mr. Lasky: Off the record, your Honor?

The Court: Very well, off the record.

(Testimony of Frank Etribou.)

(Off the record discussion among counsel and Court.) [332]

Mr. Erskine: With those changes it is all right.

Mr. Lasky: Then I offer this as Plaintiff's Exhibit next in order, and it is stipulated it may be deemed to have been read in evidence.

Mr. Erskine: You have made those changes as we went along?

Mr. Lasky: I made them on the original as we went along.

The Court: It is so admitted.

(The stipulation referred to was thereupon received in evidence and marked Plaintiff's Exhibit 18.)

Mr. Lasky: I have a few questions of Mr. Etribou.

#### Redirect Examination

By Mr. Lasky:

Q. Now, Mr. Etribou, you referred to a wire you received or your Branch received from Merchandise National Bank on October 20th, marked in evidence as Defendant's Exhibit O (and I call your attention to the wire itself). Do you recall that sentence "Impossible for us to set limit on acceptance of their checks." They are referring to United Produce Company, is that right?

A. "Impossible for us to set limit." That is correct.

Q. "On acceptance of their checks." Now, when

(Testimony of Frank Etribou.)

that wire was called to your attention, you understood by the sentence, "Impossible for us to put limit on acceptance of their checks," the Merchandise Bank was saying they could make no suggestion then as to whether you were safe in giving credit on the United [333] Produce Company's checks in any amount or what amount, is that right?

A. That is what it says. No other bank would phrase it any differently either.

Q. Certainly, and as a matter of fact, you took that as a kind of warning signal, did you not?

A. No, that is common procedure.

Q. You considered that of such importance or sufficient importance that you had precisely that same sentence inserted in the Tarr memorandum of October 22. I call your attention to the sentence, "A few days ago we wired Merchandise National Bank asking for the financial responsibility and the top limit for acceptance of checks on United Produce Company," and so forth.

A. That is his phraseology, not mine.

Q. You saw the memorandum.

A. That is correct.

Q. The contents of this was discussed when it was prepared?

A. No, it was not. It was handed to me and I initialed it.

Q. All right. You saw that sentence in there when you initialed it? A. That is right.

Q. And you have already stated your understanding of the meaning of that language. You then

(Testimony of Frank Etribou.)

testified on your cross-examination that you asked Mr. Tarr to get in touch with your Fresno Branch because there was a suggestion in that wire [334] from Merchandise National Bank and that Fresno might have more information it?

A. For further particulars, I believe.

Q. Mr. Tarr, you say, did get in touch with your Fresno office? A. By phone.

Q. And talked to the Branch Manager, Ralph Rehorn, is that correct?

A. I think he talked to Nelson, as I remember it.

Q. But after he got through talking with the Fresno office he told you that Fresno knew no more about the situation than was stated in the wire that you got from the Merchandise Bank?

Mr. Erskine: Just a second—

Mr. Lasky: I am asking him if that is not so.

Mr. Erskine: You are not attempting to state the testimony he gave on my cross-examination, I take it.

Mr. Lasky: I am attempting to bring out more testimony.

Mr. Erskine: I see, because if you are attempting to state the testimony he gave on the cross-examination, it is not a correct statement.

Mr. Lasky: I am not attempting to restate testimony, because I do not waste time that way.

The Court: It is just cross-examination by going further.

Mr. Lasky: Going further with the subject.

(Testimony of Frank Etribou.)

(The last question was read by the reporter.)

A. It is my understanding he said their record was good or [335] words to that effect.

Mr. Lasky: I call your attention to this exhibit, Plaintiff's Exhibit No. 12, Mr. Tarr's memorandum of October 22, which says, "Mr. Nelson of Fresno main office has been contacted and the information he gave us was no more than was contained in our wire of response."

A. I still contend it was good because that wire was certainly anything but detrimental.

Q. But you understood from that wire, as you have already testified, that Merchandise was telling you they could make no indications as to how far you were safe in accepting United Produce Company checks?

A. That is correct. Any bank would do the same thing.

Q. But after you had talked to Fresno and after you got that wire from Merchandise Bank a couple of days later, you did give the instructions, did you not? A. That is correct.

Q. That your Branch would not take United Produce checks or give credit on them until collected?

Mr. Erskine: Wait a second. That is not a direct statement either.

Mr. Lasky: I am asking questions.

Mr. Erskine: I know, but you state the question

(Testimony of Frank Etribou.)

as though it is testimony. That is not the testimony.

The Court: No, it is not, counsel, but counsel is not [336] limited to that. He can probe the question and probe the witness' mind with reference to the matter.

Mr. Erskine: It is a little bit misleading though to purport to state testimony.

The Court: I do not understand it as purporting to state the testimony. He is just asking him as a matter of fact a certain set of circumstances did not exist. The witness may answer yes or no.

(The question was read by the reporter.)

A. I gave such instructions but I do not recall the date. The records will indicate that.

Q. (By Mr. Lasky): Yes. Now, if you need the records to refresh your memory, the wire from Merchandise National Bank was October 20th, was it not? I think the date is right on its face.

A. It is dated October 20th.

Q. Yes, and then the memorandum of October 22nd, which states your instructions, refers to the wire and to the telephone conversation with Fresno, so that memorandum was written after those events, was it not? A. That is correct.

Q. Now, carrying the subject a little further, Mr. Etribou, it is a fact, is it not, that Fresno office told your branch, and you were so informed by Mr. Tarr, that it was not giving immediate credit at its branch to any checks of the United

(Testimony of Frank Etribou.)

Produce Company until collected; that is true, is it not? [337]

A. They may have told Tarr that.

Q. And Tarr told you that?

A. Well, that is possible, too. I do not recall that particular phase of it.

Q. And after considering all of that information you decided to put in the same kind of instruction at your Branch and did, correct?

A. The records indicate that.

Mr. Erskine: What is the answer?

Mr. Lasky: "The records indicate that," is his answer.

The Court: Yes.

Q. (By Mr. Lasky): Sometime later, as I understood you to testify on the cross-examination, Mr. Rosenthal and Mr. Lofendo called at your Branch—I think you said it was sometime within a week or so afterwards—and talked to Mr. Cosgrove? A. That is correct.

Q. And that they gave some kind of explanation to Mr. Cosgrove and that Mr. Cosgrove told you about it? A. That is correct.

Q. And you were satisfied with it at the time?

A. No, he was satisfied.

Q. Oh, he was satisfied?

A. That is right. I did not talk to him.

Q. I understand you did not talk to them, but you talked to Mr. Cosgrove? [338]

A. Cosgrove said he was satisfied with the ex-

(Testimony of Frank Etribou.)

planation and requested a certain explanation and certain letter of them.

Q. Did that report to you allay your apprehension about United Produce Company checks?

A. Did it what?

Q. Did it allay your apprehension about United Produce Company checks?

A. Well, it had some effect on it, yes.

Q. And so you relied upon the report that Mr. Cosgrove made of the explanation given to you by Rosenthal and Lofendo, correct? A. Yes.

Q. Mr. Cosgrove reported to you, did he not, that he demanded that Rosenthal confirm the explanation by a letter? A. That is correct.

Q. And he was promised that letter within the next week or so? A. That is correct.

Q. Within a week or approximately, not over ten days, Mr. Cosgrove told you, did he not, reported to you that the promised letter had not arrived? A. That is correct.

Q. And he further told you, did he not, that the failure of that letter to arrive had completely shaken his confidence in the truth of Rosenthal's explanation? A. I do not recall that phase of it. [339]

A. No.

Q. But it was after he reported to you that the promised letter from Rosenthal had not arrived that you issued your other instructions on November 10th reiterating your insistence that United Produce Company not be given credit?

A. I think those dates are correct.

(Testimony of Frank Etribou.)

Q. Pardon me?

A. I say, I believe that date is correct.

Q. Now passing over to another subject, you testified you had two telephone conversations on the 19th of November, one sometime in the morning, one going on at the time Mr. LeRoy came in the Branch there around 2:15 or thereabouts in the afternoon. Was there still a third one along about 4:30 or 5 p.m.? A. With Schilling.

Q. Yes. A. If there was, I don't recall.

Q. You do not recall any such conversation?

A. I recall talking to Schilling.

Q. Yes, and one of them was in the morning you testified? A. That is correct.

Q. And another one you say was when Mr. LeRoy was present?

A. He was in the bank at the time he called me.

Q. Have you placed the time of that one?

A. That was after three o'clock because the bank was closed. [340]

Q. Was it before four?

A. That is pretty hard to say. That is almost a year and a half ago.

Q. I understand. It was not as late as 4:30?

A. I hardly think so.

Q. So to the best of your recollection you did not have a telephone conversation with Mr. Schilling as late as 4, 4:30 in the afternoon?

A. I hardly think so.

Q. That is the best of your recollection, that what I say is correct?

(Testimony of Frank Etribou.)

A. Around 4:00 o'clock.

Q. I do not understand you now.

A. I said it was around 4:00 o'clock as near as I can recall.

Q. That you had your second telephone conversation with Mr. Schilling? A. That is right.

Q. And Mr. LeRoy arrived that late in the afternoon?

A. He was in the lobby at the time. I didn't even know he was LeRoy.

Q. I understand what your testimony is. Mr. Etribou, the day before, on the 18th, when you had your telephone conversation with Mr. Johnson, I understood you to say that Mr. Johnson told you that if you were in the clear you were to follow Merchandise's instructions about the advice of credit, is that right? [341]

A. I think he stated that we should, yes.

Q. Mr. Johnson was a lawyer for the Bank, or one of the lawyers for the Bank, was he not?

A. Yes.

Q. And yet I understood you to say earlier today that when you decided the next day to pass credit for the \$113,000.00 to the Lofendo account, you did it for two reasons: One, to protect yourself on the \$97,000 and the other, because you thought you had some legal obligation to Mr. Lofendo, is that right?

A. That is right.

Q. But the day before you had talked to your attorney and had been told by your attorney that you should follow Merchandise's instructions if

(Testimony of Frank Etribou.)

you were in the clear. Were you deciding to ignore your attorney's advice about the law?

A. I do not very often do anything like that.

Q. But in this case you decided to do so?

A. I think I did.

Q. You also testified, if I understand you correctly, that in your telephone conversation with Mr. Messenger you told him that you would be very glad to help Merchandise out provided it did not cost your Branch anything? A. That is right.

Q. And if I understood your testimony also, you testified in your telephone conversation that Mr. Johnson on the next day, the 18th, you told him very much the same thing: You would be [342] glad to help Merchandise out and follow LeRoy's instructions which he had given to Mr. Johnson, provided it did not cost your branch anything, is that right? A. That is right.

Q. Then it at that time the only thing that was in your mind was to protect your branch, you were not interested in Lofendo's rights, were you?

A. Naturally we were interested in ourselves first.

Q. And Mr. Lofendo's rights and your duty to Lofendo did not pop into your head until you had decided to protect your own loss by taking the \$113,000, is that correct?

A. That is what I stated.

Mr. Erskine: What is that?

Mr. Lasky: He said "That is what I stated."

(Testimony of Frank Etribou.)

Q. Now, at the time you talked to Messenger on the 17th, and again when you talked to Mr. Johnson on the 18th and to Mr. Duncan on the 18th, you believed and you understood that your branch was in the clear?

A. We thought we were, yes.

Q. You had given instructions some time ago before, you have testified, that no checks were to be credited until collection had been made?

A. That is correct.

Q. And you believe that had been done?

A. I thought it had, yes. [343]

Q. And then if you felt so sure that your bank had not paid out anything on checks which had not been collected, why did the possibility occur to you that your branch might not be in the clear?

A. Well, there might have been other work in the bank that I knew nothing about.

Q. You mean you thought it was quite possible at that time that somebody in your branch had violated your instructions?

A. No, that is not what I said. I said there was a possibility there might be other work in the bank that had not been posted.

Q. How could there be any other work in the bank, although not posted, which would show you that you were not in the clear if your instructions had been followed?

A. If my instructions had been followed, naturally there would not be any work in the bank, but they had not been followed.

(Testimony of Frank Etribou.)

Q. Now, but you did not know it at the time?

A. I did not.

Q. You tell us now you would help Merchandise if you were in the clear? A. That is right.

Q. But even though you thought you were in the clear and had no reason to suppose there was any reason you could not be in the clear, you want us to believe that when you were talking to Mr. Messenger and Mr. Johnson, you said you would help them only if you were in the clear, is that right? A. That is right. [344]

Q. Now is it not a fact that on Sunday, the 21st of November, at your office in Bakersfield where a group of men met—you, Mr. LeRoy and your Bank's attorney, Mr. Bianco—either you or Mr. Bianco said to Mr. LeRoy, you offered to give him the \$30,000 balance in settlement of the claim? That happened, did it not?

A. If any statement was made of that kind, it was made by Bianco, not by me.

Q. All right, was that statement made by Bianco?

A. I don't know whether it was or not.

Q. Personally you can't testify to the matter?

A. I can't, no; because I wasn't listening.

Q. Well, if you can't, we won't go into it. And now you have said that in your telephone conversation with Mr. Messenger on the 17th, you said you were going to stand on the entry. Do I state your testimony correctly on that?

A. That's right.

(Testimony of Frank Etribou.)

Q. Well, now, at that time you hadn't made any entry on the \$113,000; you hadn't yet received advice of credit. What kind of entry were you going to stand on?

A. Oh, his statement that it had been mailed to us, an advice of credit.

Q. Now at that time you tell us that in the telephone conversation with Mr. Messenger, you said you would be glad to offset. As I understand you, there was no— [345]

A. No, I didn't say that. He asked me to offset.

Q. And you said you would?

A. I said I would not—I couldn't go along with him.

Q. Oh, I see. You would not even offset. All right.

Mr. Lasky: That is all, Mr. Etribou.

Mr. Erskine: Just a second, Mr. Etribou.

#### Recross-Examination

By Mr. Erskine:

Q. It is a fact, is it not, that on about November the 13th, certain checks were received at your bank—that is, Saturday, November the 13th—certain checks were received at your bank drawn by Lofendo on this account which were not rejected. That is correct, isn't it?

A. Well, the statement—you mean were actually paid against the account?

Q. Well, that were not rejected on the 13th.

(Testimony of Frank Etribou.)

A. No, I am sorry. Of course I—I don't handle those items. It would be pretty hard for me to remember that from memory.

Q. Do you remember whether or not the three checks of Lofendo drawn in favor of the United Produce Company were carried in suspense for a few days until a credit was established in the account against which they were charged? Do you remember that?

A. Tarr would have to answer that. He handles that operation.

Q. Well, it is a fact, is it not, Mr. Etribou, that checks have to be rejected within a limited time in order to establish the right of the bank on which they are drawn to reject them? [346]

A. That is correct.

Mr. Lasky: Well, if the Court please, I move that go out until I get my objection in.

The Court: That may be stricken.

Mr. Lasky: That is calling for a legal conclusion. We have just entered into a stipulation that the rights to return them depends upon contract, clearing house rule or statute, and in any event, it would be a legal conclusion on the witness' part.

The Court: Isn't that the situation, counsel?

Mr. Erskine: The purpose is, your Honor, to show this, that in the conduct of a bank's business things may be in the works, as this witness says, that will affect the account. I was trying to call his attention to these three checks in suspense that were not rejected within time and therefore carried

(Testimony of Frank Etribou.)

and to be charged. Matters of that sort do not appear upon the statement, but——

The Court: Well, just show the facts, whatever the facts are.

Mr. Lasky: That will be one of the things we have got in that stipulation I am awaiting an answer on that we discussed yesterday morning. They were going to rephrase a sentence or two on that very item.

Mr. Erskine: Well, it relates to the statement of the witness with respect to matters in the work that do not appear on the account. [347]

The Court: Well, it is just a question of fact, though.

Mr. Erskine: Yes, that is right.

The Court: And the proposed stipulation covers the fact situation?

Mr. Lasky: Precisely. It is intended to.

The Court: Well, I will sustain the objection at this point.

Q. (By Mr. Erskine): Now, counsel asked you whether or not you told Mr. Messenger that you would stand on the entry, and he asked you whether or not you at that time were considering Lofendo's rights. Now in that connection I will ask you, Mr. Etribou, whether it is not a fact, as you have already testified, according to my understanding, that you had told Mr. Messenger that if he gave to Mr. LeRoy, who was coming out here, or the man who was coming out here, checks drawn by Lofendo against the account, you would do what

(Testimony of Frank Etribou.)

you could to give him preference in charging those checks against the credit? A. That is correct.

Q. That is—

A. Told him to bring them along if he had any.

Q. Yes. That you would enter the credit and if the man brought the checks along, you would charge those checks against it. Is that what you told Messenger?

A. Charge them against Lofendo's account and give him appropriate credit. [348]

Q. Yes. Now there seems to be a little dispute here, a little misunderstanding between counsel and myself, with respect to what your instructions to Tarr actually were on this, as recited on this memorandum of October the 22nd. This says that: "The matter has been taken up with Mr. Etribou, manager, and he has given instructions that we do not accept these checks for immediate credit until such time as Mr. Lofendo can be contacted and his method of operation discussed." Were those your instructions?

A. Yes, those were the instructions.

Q. You said that credit was not, checks were not to be paid against the credits until Lofendo had been contacted and his method of operation discussed, is that right? A. That is correct.

Q. Now referring to this wire, Mr. Etribou, marked Defendant's Exhibit O, I believe you have already testified that you have seen this wire?

A. That is right.

Q. I will call your attention to this statement

(Testimony of Frank Etribou.)

in the wire: "United Produce. We loaned them legal limit on secured basis." Was there anything in that statement—I withdraw that. What did you understand by that statement?

A. Well, he must be a reputable client, because they certainly wouldn't extend him that type of credit unless he was. [349]

Q. They wouldn't be loaning up to the legal limit unless he was a reputable client, is that right?

A. That's right. That is for preferred customers.

Q. Now "Net worth of company over \$80,000." Of course you understood those words to mean what they said? A. That is correct.

Q. Now, "Impossible for us—" —counsel asked you particularly about this: "Impossible for us to set limit on acceptance of their checks." Did you say that that is a customary practice with banks to put a protecting clause like that in such a wire?

A. Why, certainly.

Q. It is done frequently?

A. I couldn't state that you, as a client of my branch,—we would pay unlimited checks drawn by you, or anyone else, for that matter.

Q. The next statement is, "Checks up to present have never returned—" Oh, pardon me; "up to present have never returned any checks." What did you understand that to mean, Mr. Etribou?

A. They certainly must have had a good account and carried it in a satisfactory manner to them.

Q. That is what you understood that to mean?

(Testimony of Frank Etribou.)

A. I could not misunderstand it.

Q. Was there anything in that wire that alerted you that the United Produce Company might not be a good business risk?

A. No, I thought that they were an excellent of theirs. [350]

Q. That is what the wire led you to believe?

A. Couldn't help believing that.

Mr. Lasky: Well, I move to strike that, "Couldn't help but believe that."

Mr. Erskine: Well, leave out the "help." That is, what the wire led you to believe?

A. That is correct.

The Court: Very well.

Mr. Erskine: I think that is all.

The Court: Any further questions?

Mr. Lasky: No further questions.

The Court: Just a moment, Mr. Etribou. There is one thing that I want to understand.

Q. When Mr. LeRoy came to your branch on the afternoon of the 19th—is it the 19th?

Mr. Lasky: Nineteenth.

The Court (Continuing): —you wouldn't talk to him? A. Oh, yes, I talked to him.

Q. You wouldn't discuss the Lofendo account with him? A. That is correct.

Q. Is that the same account that you talked with Mr. Messenger on the phone about?

A. That is the same account, yes.

Q. And in your conversation with Mr. Messen-

(Testimony of Frank Etribou.)

ger, you had told him to send his man out and you would talk to him? [351]

A. With checks, and I would honor them.

Q. But when the man got there, you didn't care to talk to him?

A. Well, he was supposed to have been there the very next day. Instead, he went to San Francisco and discussed our business with the head office.

Q. And you resented him going to the head office?

A. No, sir, not necessarily. I was acting on my counsel's advice.

Q. Well, then, why didn't you talk to him?

A. I talked to him.

Q. About the account? A. No.

Q. Well, that is what I mean. Why didn't you talk to him about the account? It didn't make any difference whether you were inquiring about the weather or anything of that nature. Don't you understand what we are driving at here?

A. Yes, I understand, but I said I was carrying out my counsel's instructions.

Q. Well, your counsel told you that?

A. That is correct.

Q. And it is not because he went to San Francisco, to the central office? A. Oh, no.

Q. Then I am mistaken if I understood you to say that, that you didn't say, that the reason you didn't talk to him was because— [352]

A. Oh, no.

Q. —he went to the head office?

(Testimony of Frank Etribou.)

A. Oh, no, that had no bearing on it at all.

Q. The only reason you wouldn't talk to him about the account is because Mr. Schilling had told you?

A. He told me not to discuss the matter with him at all.

Q. In the conversation you had, Mr. Schilling told you that on the telephone?

A. That is correct, while he was in the office.

Q. And that is the only reason you didn't talk to him?

A. Certainly. Nothing personal about it.

The Court: That is all.

(Witness excused.)

Mr. Lasky: Now, I was prepared to put Mr. LeRoy on now, but I notice Mr. Erskine has—is this Mr. Cosgrove?

Mr. Erskine: Yes.

Mr. Lasky: From Bakersfield. And if you are eager to be sure he gets back today, I can put him on instead of Mr. LeRoy. It will only take a few moments.

Mr. Erskine: It would be a good idea all right.

The Court: Do you want to take a short period of recess at this point or finish with this witness?

Mr. Lasky: I think we can finish with this witness before three, and then we can take our recess before we go on with Mr. LeRoy, who may be much longer. [353]

Very well, come forward.